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Joseph Ashby Partridge.

THE

WORKS

OF

SIR WILLIAM JONES.

WITH

THE LIFE OF THE AUTHOR,

BY

LORD TEIGNMOUTH.

IN THIRTEEN VOLUMES.

VOLUME VIII.

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CONTENTS

TO

THE EIGHTH VOLUME.

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	PAGE
CHAP. IX.—On Judicature; on Law, Private and Criminal; and on the Commercial and Servile Classes - - - -	1
CHAP. X.—On the Mixed Classes, and on Times of Distress - - -	58
CHAP. XI.—On Penance and Expiation -	81
CHAP. XII.—On Transmigration and Final Beatitude - - - -	129
General Note - - - -	152
Letter to the Right Honourable Henry Dundas	157

THE MAHOMEDAN LAW OF SUCCESSION TO PROPERTY OF INTESTATES.

Preface - - - -	161
In Arabick - - - -	169
The Translation - - - -	185

AL SIRA'JIYYAH; OR, THE MOHAMMEDAN LAW OF INHERITANCE.

The Preface - - - -	199
The Introduction - - - -	213
On Impediments to Succession - -	215

CONTENTS.

PAGE

On the Doctrine of Shares, and the Persons entitled to them - - - - 215
On Women - - - - 217
On Residuaries - - - - 222
On Exclusion - - - - 225
On the Division of Shares - - - 226
On the Increase - - - - 227
On the Equality, Proportion, Agreement, and Difference of two Numbers - - - 228
On Arrangement - - - 230
Section - - - - - 232
On the Division of the Property left among Heirs, and among Creditors - - - 233
On Subtraction - - - - 234
On the Return - - - - 235
On the Division of the paternal Grandfather - 237
On Succession to vested Interests - - 240
On Distant Kindred - - - 242
On the First Class - - - 244
A Section - - - - 247
On the Second Class - - - 248
On the Third Class - - - 249
On the Fourth Class - - - 252
On their Children, and the Rules concerning them 254
On Hermaphrodites - - - 256
On Pregnancy - - - - 258
On a Lost Person - - - 262
On an Apostate - - - - 264
On a Captive - - - - 265
On Persons drowned, or burned, or overwhelmed in Ruins - - - - ib.
A Commentary on the Sirájiyyah - - 266

AN ESSAY ON THE LAW OF BAILMENTS.

Introduction - - - - 325

CONTENTS.

	PAGE
The Subject proposed - - -	328
I. The Analysis - - -	329
II. The History - - - -	336
1. Jewish and Athenian Law - -	ib.
2. Roman Law - - -	337
Prejudices against it - - -	338
Distinction between the private and publick, the rational and positive, Laws of Rome -	339
Two famous Laws of Ulpian - -	ib.
Critical Remarks on them - -	341
Definitions and Rules - - -	346
System of J. Godefroi - - -	349
Opinions of Zasius and Donellus - -	351
System of Le Brun - - -	352
Vindication of the old System by Pothier -	355
Observations on Le Brun - -	357
3. English Law - - -	360
Lord Holt's Division of Bailments - -	361
New Division and Definitions - -	ib.
1. Law of Deposits.	
Bonion's Case - - -	363
Mosaick Laws - - -	366
Southcote's Case - - -	368
Rules and Exceptions - - -	374
Grecian and Arabian Laws - -	378
2. Law of Mandates - - -	379
Distinction between Nonfesance and Misfesance	382
Case of Coggs and Bernard - -	386
Exceptions to the Rule - - -	388
3. Law of Loans for Use - - -	392
Criticism on Bracton - - *note*,	ib.
Opinion of Pufendorf disputed - -	395
Cases and Distinctions - - -	398
Controversy among the Civilians - -	399

THE

LAWS OF MENU,

SON OF BRAHMÁ,

(CONTINUED.)

CHAPTER THE NINTH.

On Judicature; on Law, Private and Criminal; and on the Commercial and Servile Claſſes.

1. 'I NOW will propound the immemorial 'duties of man and woman, who muſt both 'remain firm in the legal path, whether united 'or ſeparated.

2. 'Day and night muſt women be held by 'their protectors in a ſtate of dependence; but 'in *lawful and innocent* recreations, though 'rather addicted to them, they may be left at 'their own diſpoſal.

3. 'Their fathers protect them in childhood; 'their huſbands protect them in youth; their 'ſons protect them in age: a woman is never 'fit for independence.

4. 'Reprehenſible is the father, who gives 'not his daughter in marriage at the proper 'time; and the huſband, who approaches not 'his wife in due ſeaſon; reprehenſible alſo is 'the ſon, who protects not his mother after the 'death of her lord.

5. 'Women muſt, above all, be reſtrained 'from the ſmalleſt illicit gratification; for, not 'being thus reſtrained, they bring ſorrow on 'both families:

6. 'Let huſbands conſider this as the ſupreme 'law, ordained for all claſſes; and let them, 'how weak ſoever, diligently keep their wives 'under lawful reſtrictions;

7. 'For he, who preſerves his wife *from 'vice*, preſerves his offspring *from ſuſpicion of 'baſtardy*, his ancient uſages *from neglect*, his 'family *from diſgrace*, himſelf *from anguiſh*, and 'his duty *from violation.*

8. 'The huſband, after conception by his 'wife, becomes himſelf an embryo, and is born 'a ſecond time here below; for which reaſon 'the wife is called *jáyá*, ſince by her (*jáyaté*) 'he is born again:

9. 'Now the wife brings forth a ſon endued 'with ſimilar qualities to thoſe of the father; 'ſo that, with a view to an excellent offspring, 'he muſt vigilantly guard his wife.

10. 'No man, indeed, can wholly reſtrain

'women by violent meaſures; but, by theſe 'expedients, they may be reſtrained:

11. 'Let the huſband keep his wife employ-'ed in the collection and expenditure of wealth, 'in purification and female duty, in the pre-'paration of daily food, and the ſuperintend-'ence of houſehold utenſils.

12. 'By confinement at home, even under 'affectionate and obſervant guardians, they are 'not ſecure; but thoſe women are truly ſecure, 'who are guarded by their own good inclina-'tions.

13. 'Drinking *ſpirituous liquor*, aſſociating 'with evil perſons, abſence from her huſband, 'rambling abroad, unſeaſonable ſleep, and 'dwelling in the houſe of another, are ſix 'faults which bring infamy on a married wo-'man:

14. 'Such *women* examine not beauty, nor 'pay attention to age; whether *their lover be* 'handſome or ugly, they think it is enough 'that he is a man, and purſue their pleaſures.

15. 'Through their paſſion for men, their 'mutable temper, their want of ſettled affection, 'and their perverſe nature (let them be guard-'ed in this world ever ſo well) they ſoon be-'come alienated from their huſbands.

16. 'Yet ſhould their huſbands be diligently 'careful in guarding them; though they well

'know the diſpoſition, with which the lord of 'creation formed them:

17. 'MENU allotted to ſuch women a love of 'their bed, of their ſeat, and of ornament, im-'pure appetites, wrath, weak flexibility, deſire 'of miſchief, and bad conduct.

18. 'Women have no buſineſs with the 'texts of the *Vèda*; thus is the law fully ſettled: 'having, therefore, no evidence *of law*, and no '*knowledge of* expiatory texts, ſinful women 'muſt be as foul as falſehood itſelf; and this is 'a fixed rule.

19. 'To this effect many texts, which may 'ſhow their true diſpoſition, are chanted in the '*Vèdas:* hear now their expiation for ſin.

20. "That pure blood, which my mother "defiled by adulterous deſire, frequenting the "houſes of other men, and violating her duty "to her lord, that blood may my father pu-"rify!" Such is the tenour of the holy text, '*which her ſon, who knows her guilt, muſt pro-'nounce for her*;

21. '*And* this expiation has been declared 'for every unbecoming thought, which en-'ters her mind, concerning infidelity to her 'huſband; ſince that *is the beginning of* adul-'tery.

22. 'Whatever be the qualities of the man, 'with whom a woman is united by lawful

'marriage, ſuch qualities even ſhe aſſumes;
'like a river *united* with the ſea.

23. 'ACSHAMA'LA', a woman of the loweſt
'birth, being thus united to VASISHT'HA, and
'SA'RANGI', being united to MANDAPA'LA,
'were entitled to very high honour:

24. 'Theſe, and other females of low birth,
'have attained eminence in this world by the
'reſpective good qualities of their lords.

25. 'Thus has the law, ever pure, been pro-
'pounded for the civil conduct of men and
'women: hear, next, the laws concerning
'children, by obedience to which may happi-
'neſs be attained in this and the future life.

26. 'WHEN good women, united with huſ-
'bands in expectation of progeny, eminently
'fortunate and worthy of reverence, irradiate
'the houſes of their lords, between them and
'goddeſſes of abundance there is no diverſity
'whatever.

27. 'The production of children, the nur-
'ture of them, when produced, and the daily
'ſuperintendence of domeſtick affairs, are pe-
'culiar to the wife:

28. 'From the wife alone proceed offspring,
'good houſehold management, ſolicitous atten-
'tion, moſt exquiſite careſſes, and that heavenly
'beatitude, which ſhe obtains for the manes of
'anceſtors, and for *the huſband* himſelf.

29. 'She, who deſerts not her lord, but 'keeps in ſubjection to him her heart, her 'ſpeech, and her body, ſhall attain his manſion 'in heaven, and, by the virtuous in this world, 'be called *Sádhwì, or good and faithful*;

30. 'But a wife, by diſloyalty to her huſ-'band, ſhall incur diſgrace in this life, and be 'born *in the next* from the womb of a ſhakal, 'or be tormented with horrible diſeaſes, which 'puniſh vice.

31. 'LEARN now that excellent law, univer-'ſally ſalutary, which was declared, concerning 'iſſue, by great and good ſages formerly born,

32. 'They conſider the male iſſue of a wo-'man as the ſon of the lord; but, on the ſub-'ject of that lord, a difference of opinion is 'mentioned in the *Véda*; ſome giving that 'name to the real procreator of the child, and 'others applying it to the married poſſeſſor of 'the woman.

33. 'The woman is conſidered in law as the 'field, and the man as the grain: now vegeta-'ble bodies are formed by the united operation 'of the ſeed and the field.

34. 'In ſome caſes the prolifick power of 'the male is chiefly diſtinguiſhed; in others, 'the receptacle of the female; but, when both 'are equal in dignity, the offspring is moſt 'highly eſteemed:

35. 'In general, as between the male and 'female powers of procreation, the male is held 'ſuperiour; ſince the offſpring of all procreant 'beings is diſtinguiſhed by marks of the male 'power.

36. 'Whatever be the quality of ſeed, ſcat-'tered in a field prepared in due ſeaſon, a plant 'of the ſame quality ſprings in that field, with 'peculiar viſible properties.

37. 'Certainly this earth is called the pri-'meval womb of many beings; but the ſeed 'exhibits not in its vegetation any properties 'of the womb.

38. 'On earth here below, even in the ſame 'ploughed field, ſeeds of many different forms, 'having been ſown by huſbandmen in the 'proper ſeaſon, vegetate according to their 'nature:

39. 'Riceplants, mature in ſixty days, and 'thoſe, which require tranſplantation, *mudga*, '*tila*, *máſha*, barley, leaks, and ſugarcanes all 'ſpring up according to the ſeeds.

40. 'That one plant ſhould be ſown, and 'another produced, cannot happen: whatever 'ſeed may be ſown, even that produces its 'proper ſtem.

41. 'Never muſt it be ſown in another 'man's field by him, who has natural good 'ſenſe, who has been well inſtructed, who

'knows the *Véda* and its *Angas*, who deſires 'long life:

42. 'They, who are acquainted with paſt 'times, have preſerved, on this ſubject, holy 'ſtrains chanted by every breeze, *declaring*, 'that "ſeed muſt not be ſown in the field of "another man."

43. 'As the arrow of that hunter is vain, 'who ſhoots it into the wound, which another 'had made juſt before in the antelope, thus 'inſtantly periſhes the ſeed, which a man 'throws into the ſoil of another:

44. 'Sages, who know former times, conſi-'der this earth *(Prit'hivi)* as the wife of king 'PRITHU; and thus they pronounce cultivated 'land to be the property of him, who cut away 'the wood, *or who cleared and tilled it*; and the 'antelope, of the firſt hunter, who mortally 'wounded it.

45. 'Then only is a man perfect, when he 'conſiſts of *three perſons united*, his wife, him-'ſelf, and his ſon; and thus have learned *Bráh-'mens* announced this *maxim*: "The huſband "is even one perſon with his wife," *for all do-'meſtick and religious, not for all civil, purpoſes.*

46. 'Neither by ſale nor deſertion can a 'wife be releaſed from her huſband: thus we 'fully acknowledge the law enacted of old by 'the lord of creatures.

47. 'Once is the partition of an inheritance 'made; once is a damſel given in marriage; 'and once does a man ſay "I give:" theſe 'three are, by good men, done once for all *and* '*irrevocably*.

48. 'As with cows, mares, female camels, 'ſlave girls, milch buffalos, ſhegoats, and ewes, 'it is not the owner of the *bull or other* father, 'who owns the offspring, even thus is it with 'the wives of others.

49. 'They, who have no property in the 'field, but, having grain in their poſſeſſion, 'ſow it in ſoil owned by another, can receive 'no advantage whatever from the corn, which 'may be produced:

50. 'Should a bull beget a hundred calves 'on cows not owned by his maſter, thoſe 'calves belong ſolely to the proprietors of 'the cows; and the ſtrength of the bull was 'waſted:

51. 'Thus men, who have no marital pro- 'perty in women, but ſow in the fields owned 'by others, may raiſe up fruit to the huſbands; 'but the procreator can have no advantage 'from it.

52. 'Unleſs there be a ſpecial agreement 'between the owners of the land and of the 'ſeed, the fruit belongs clearly to the land-

'owner; for the receptacle is more important
'than the ſeed:

53. 'But the owners of the ſeed and of the
'ſoil may be conſidered in this world as joint
'owners of the crop, which they agree, by
'ſpecial compact in conſideration of the ſeed,
'to divide between them.

54. 'Whatever man owns a field, if ſeed,
'conveyed into it by water or wind, ſhould
'germinate, the plant belongs to the land-
'owner: the mere ſower takes not the fruit.

55. 'Such is the law concerning the off-
'ſpring of cows, and mares, of female camels,
'goats, and ſheep, of ſlave girls, hens, and
'milch buffalos, *unleſs there be a ſpecial agree-*
'*ment.*

56. 'THUS has the comparative importance
'of the ſoil and the ſeed been declared to you:
'I will next propound the law concerning
'women, who have no iſſue *by their huſbands.*

57. 'The wife of an elder brother is con-
'ſidered as mother-in-law to the younger; and
'the wife of the younger as daughter-in-law to
'the elder:

58. 'The elder brother, amorouſly ap-
'proaching the wife of the younger, and the
'younger, careſſing the wife of the elder, are
'both degraded, even though anthorized *by the*

'*huſband or ſpiritual guide*, except when ſuch 'wife has no iſſue.

59. 'On failure of iſſue by the huſband, *if* '*he be of the ſervile claſs*, the deſired offſpring 'may be procreated, either by his brother or 'ſome other *ſapinda*, on the wife, who has been 'duly authorized:

60. 'Sprinkled with clarified butter, ſilent, 'in the night, let the kinſman thus appointed 'beget one ſon, but a ſecond by no means, on 'the widow *or childleſs wife:*

61. 'Some ſages, learned in the laws con-'cerning women, thinking it poſſible, that the 'great object of that appointment may not be 'obtained *by the birth of a ſingle ſon*, are of opi-'nion, that the wife and appointed kinſman 'may legally procreate a ſecond.

62. 'The firſt object of the appointment 'being obtained according to law, both *the* '*brother and the widow* muſt live together like 'a father and a daughter by affinity.

63. 'Either brother, appointed for this pur-'poſe, who deviates from the ſtrict rule, and 'acts from carnal deſire, ſhall be degraded, as 'having defiled the bed of his daughter-in-law 'or of his father.

64. 'By men of twiceborn claſſes no widow, '*or childleſs wife*, muſt be authorized to con-'ceive by any other than her lord; for they,

'who authorize her to conceive by any other,
'violate the primeval law.

65. 'Such a commiſſion *to a brother or other*
'*near kinſman* is nowhere mentioned in the
'nuptial texts of the *Véda*; nor is the marriage
'of a widow even named in the laws con-
'cerning marriage,

66. 'This practice, fit only for cattle, is re-
'prehended by learned *Bráhmens*; yet it is de-
'clared to have been the practice even of men,
'while VE'NA had ſovereign power:

67. 'He, poſſeſſing the whole earth, and
'*thence only called* the chief of ſage monarchs,
'gave riſe to a confuſion of claſſes, when his
'intellect became weak through luſt.

68. 'Since his time the virtuous diſapprove
'of that man, who, through deluſion of mind,
'directs a widow *to receive the careſſes of another*
'for the ſake of progeny.

69. 'The damſel, *indeed*, whoſe huſband
'ſhall die after troth verbally plighted, *but*
'*before conſummation*, his brother ſhall take in
'marriage according to this rule:

70. 'Having eſpouſed her in due form of
'law, ſhe being clad in a white robe, and pure
'in her moral conduct, let him approach her
'once in each proper ſeaſon, and until iſſue
'*be had*.

71. 'LET no man of ſenſe, who has once

'given his daughter to a ſuitor, give her again 'to another; for he, who gives away his 'daughter, whom he had before given, incurs 'the guilt and fine of ſpeaking falſely in a 'cauſe concerning mankind.

72. 'EVEN though a man have married a 'young woman in legal form, yet he may aban- 'don her, if he find her blemiſhed, afflicted 'with diſeaſe, or previouſly deflowered, and 'given to him with fraud:

73. 'If any man give a faulty damſel in 'marriage, without diſcloſing her blemiſh, the 'huſband may annul that act of her illminded 'giver.

74. 'SHOULD a man have buſineſs abroad, 'let him aſſure a fit maintenance to his wife, 'and then reſide *for a time* in a foreign country; 'ſince a wife, even though virtuous, may be 'tempted to act amiſs, if ſhe be diſtreſſed by 'want of ſubſiſtence:

75. 'While her huſband, having ſettled her 'maintenance, reſides abroad, let her continue 'firm in religious auſterities; but, if he leave 'her no ſupport, let her ſubſiſt by *ſpinning and 'other* blameleſs arts.

76. 'If he live abroad on account of ſome 'ſacred duty, let her wait for him eight 'years; if on account of knowledge or fame,

'ſix; if on account of pleaſure, three: *after* 'thoſe terms have expired, ſhe muſt follow him.

77. 'For a whole year let a huſband bear 'with his wife, who treats him with averſion; 'but, after a year, let him deprive her of her ſepa-'rate property, and ceaſe to cohabit with her.

78. 'She, who neglects her lord, though ad-'dicted to gaming, fond of ſpirituous liquors, 'or diſeaſed, muſt be deſerted for three months, 'and deprived of her ornaments and houſehold 'furniture:

79. 'But ſhe, who is averſe from a mad huſ-'band, or a deadly ſinner, or an eunuch, or one 'without manly ſtrength, or one afflicted with 'ſuch maladies as puniſh crimes, muſt neither 'be deſerted nor ſtripped of her property.

80. 'A WIFE, who drinks any ſpirituous 'liquors, who acts immorally, who ſhows 'hatred *to her lord*, who is *incurably* diſeaſed, 'who is miſchievous, who waſtes his property, 'may at all times be ſuperſeded by another 'wife.

81. 'A barren wife may be ſuperſeded by 'another in the eighth year: ſhe, whoſe chil-'dren are all dead, in the tenth; ſhe, who 'brings forth *only* daughters, in the eleventh; 'ſhe, who ſpeaks unkindly, without delay;

82. 'But ſhe, who, though afflicted with

'illneſs, is beloved and virtuous, muſt never be 'diſgraced, though ſhe may be ſuperſeded by 'another wife with her own conſent.

83. 'If a wife, legally ſuperſeded, ſhall de-'part in wrath from the houſe, ſhe muſt either 'inſtantly be confined, or abandoned in the 'preſence of the whole family:

84. 'But ſhe, who, having been forbidden, 'addicts herſelf to intoxicating liquor even at 'jubilees, or mixes in crowds at theatres, muſt 'be fined ſix *racticás* of gold.

85. 'When twiceborn men take wives, both 'of their own claſs and others, the precedence, 'honour, and habitation of thoſe wives, muſt 'be ſettled according to the order of their 'claſſes:

86. 'To all ſuch married men, the wives of 'the ſame claſs only (not wives of a different 'claſs by any means) muſt perform the duty 'of perſonal attendance, and the daily buſineſs 'relating to acts of religion;

87. 'For he, who fooliſhly cauſes thoſe 'duties to be performed by any other than his 'wife of the ſame claſs, when ſhe is near at 'hand, has been immemorially conſidered as a 'mere *Chandála* begotten on a *Bráhmení*.

88. 'To an excellent and handſome youth 'of the ſame claſs, let every man give his 'daughter in marriage, according to law; even

'though ſhe have not attained her age of *eight* 'years:

89. 'But it is better, that the damſel, 'though marriageable, ſhould ſtay at home till 'her death, than that he ſhould ever give her 'in marriage to a bridegroom void of excellent 'qualities.

90. 'Three years let a damſel wait, though 'ſhe be marriageable; but, after that term, let 'her chuſe for herſelf a bridegroom of equal 'rank:

91. 'If, not being given in marriage, ſhe 'chuſe her bridegroom, neither ſhe, nor the 'youth choſen, commits any offence;

92. 'But a damſel, thus electing her huſ- 'band, ſhall not carry with her the ornaments, 'which ſhe received from her father, nor thoſe 'given by her mother or brethren: if ſhe carry 'them away, ſhe commits theft.

93. 'He, who takes to wife a damſel of full 'age, ſhall not give a nuptial preſent to her 'father; ſince the father loſt his dominion 'over her, by detaining her at a time, when 'ſhe might have been a parent.

94. 'A man, aged thirty years, may marry 'a girl of twelve, *if he find one* dear to his 'heart; or a man of twenty-four years, a 'damſel of eight: but, if *he finiſh his ſtudentſhip* 'earlier, *and* the duties *of his next order* would

'otherwiſe be impeded, let him marry immediately.

95. 'A wife, given by the gods, *who are named in the bridal texts*, let the huſband receive and ſupport conſtantly, if ſhe be virtuous, though he married her not from inclination: ſuch conduct will pleaſe the gods.

96. 'To be mothers were women created; and to be fathers, men; religious rites, therefore, are ordained in the *Veda* to be performed *by the huſband* together with the wife.

97. 'If a nuptial gratuity has actually been given to a damſel, and he, who gave it, ſhould die *before marriage*, the damſel ſhall be married to his brother, if ſhe conſent;

98. 'But even a man of the ſervile claſs ought not to receive a gratuity, when he gives his daughter in marriage; ſince a father, who takes a fee *on that occaſion*, tacitly ſells his daughter.

99. 'Neither ancients nor moderns, who were good men, have ever given a damſel in marriage, after ſhe had been promiſed to another man;

100. 'Nor, even in former creations, have we heard *the virtuous approve* the tacit ſale of a daughter for a price, under the name of a nuptial gratuity.

101. "Let mutual fidelity continue till death:"

'this, in few words, may be conſidered as the 'ſupreme law between huſband and wife.

102. 'Let a man and woman, united by 'marriage, conſtantly beware, leſt, at any 'time diſunited, they violate their mutual 'fidelity.

103. 'Thus has been declared to you the 'law, abounding in the pureſt affection, for 'the conduct of man and wife; together with 'the practice of raiſing up offspring *to a huſband* '*of the ſervile claſs* on failure *of iſſue by him be-*'*gotten:* learn now the law of inheritance.

104. 'After the death of the father and the 'mother, the brothers, being aſſembled, may 'divide among themſelves the paternal *and* '*maternal* eſtate; but they have no power over 'it, while their parents live, *unleſs the father* '*chuſe to diſtribute it.*

105. 'The eldeſt brother may take entire 'poſſeſſion of the patrimony; and the others 'may live under him, as *they lived* under their 'father, *unleſs they chuſe to be ſeparated.*

106. 'By the eldeſt, at the moment of his 'birth, the father, having begotten a ſon, diſ-'charges his debt to his own progenitors; the 'eldeſt ſon, therefore, ought *before partition* to 'manage the whole patrimony:

107. 'That ſon alone, by whoſe birth he 'diſcharges his debt, and through whom he

'attains immortality, was begotten from a 'ſenſe of duty: all the reſt are conſidered by 'the wife as begotten from love of pleaſure.

108. 'Let the father alone ſupport his ſons; 'and the firſt born, his younger brothers; and 'let them behave to the eldeſt, according to 'law, as children *ſhould behave* to their father.

109. 'The firſt born, *if virtuous*, exalts the 'family, or, *if vitious*, deſtroys it: the firſt born 'is in this world the moſt reſpectable; and the 'good never treat him with diſdain.

110. 'If an elder brother act, as an elder 'brother ought, he is *to be revered* as a mother, 'as a father; and, even if he have not the be- 'haviour of a good elder brother, he ſhould be 'reſpected as a *maternal uncle, or other* kinſ- 'man.

111. 'Either let them thus live together, 'or, if they deſire *ſeparately to perform* religious 'rites, let them live apart; ſince religious du- 'ties are multiplied in ſeparate houſes, their 'ſeparation is, therefore, legal *and even laud- 'able*.

112. 'The portion deducted for the eldeſt is 'a twentieth part *of the heritage*, with the beſt 'of all the chattels; for the middlemoſt, half 'of that, *or a fortieth*; for the youngeſt, a 'quarter of it, *or an eightieth*.

113. 'The eldeſt and youngeſt reſpectively

'take their juſt mentioned portions; and, if 'there be more than one between them, each 'of the intermediate ſons has the mean portion, 'or *the fortieth.*

114. 'Of all the goods collected, let the firſt 'born, *if he be tranſcendantly learned and vir-* 'tuous, take the beſt article, whatever is moſt 'excellent in its kind, and the beſt of ten *cows* 'or *the like:*

115. 'But, among brothers equally ſkilled in 'performing their ſeveral duties, there is no 'deduction of the beſt in ten, *or the moſt excel-* 'lent chattel; though ſome trifle, as a mark of 'greater veneration, ſhould be given to the firſt 'born.

116. 'If a deduction be thus made, let equal 'ſhares of the reſidue be aſcertained *and re-* 'ceived; but, if there be no deduction, the 'ſhares muſt be diſtributed in this manner:

117. 'Let the eldeſt have a double ſhare, 'and the next born, a ſhare and a half, *if they* 'clearly ſurpaſs the reſt in virtue and learning; 'the younger ſons muſt have each a ſhare: *if* 'all be equal in good qualities, they muſt all take 'ſhare and ſhare alike.

118. 'To the *unmarried* daughters *by the* 'ſame mother, let their brothers give portions 'out of their own allotments reſpectively, *ac-* 'cording to the claſſes of their ſeveral mothers:

'let each give a fourth part of his own diſtinct 'ſhare; and they, who refuſe to give it, ſhall 'be degraded.

119. 'Let them never divide *the value of* a 'ſingle goat or ſheep, or a ſingle beaſt with 'uncloven hoofs: a ſingle goat or ſheep *re-* 'maining after an equal diſtribution belongs to 'the firſt born.

120. 'Should a younger brother *in the man-* 'ner before mentioned have begotten a ſon on the 'wife of his *deceaſed* elder brother, the diviſion 'muſt then be made equally *between that ſon,* 'who repreſents the deceaſed, and his natural fa- 'ther: thus is the law ſettled.

121. 'The repreſentative is not *ſo far* wholly 'ſubſtituted by law in the place of the *deceaſed* 'principal, *as to have the portion of an elder ſon;* 'and the principal became a father in conſe- 'quence of the procreation *by his younger bro-* 'ther; the ſon, therefore, is entitled by law to 'an equal ſhare, *but not to a double portion.*

122. 'A younger ſon being born of a firſt 'married wife, after an elder ſon had been 'born of a wife laſt married, *but of a lower* 'claſs, it may be a doubt in that caſe, how the 'diviſion ſhall be made:

123. 'Let the ſon, born of the elder wife, 'take one moſt excellent bull deducted from 'the inheritance: the next excellent bulls are

'for thoſe, who *were born firſt, but* are inferior
'on account of their mothers, *who were married*
'*laſt.*

124. 'A ſon, indeed, who was firſt born,
'and brought forth by the wife firſt married,
'may take, *if learned and virtuous*, one bull and
'fifteen cows; and the other ſons may then
'take, each in right of his ſeveral mother;
'ſuch is the fixed rule.

125. 'As between ſons, born of wives equal
'in their claſs *and* without *any other* diſtinction,
'there can be no ſeniority in right of the mo-
'ther; but the ſeniority ordained by law, is
'according to the birth.

126. 'The right of invoking INDRA by the
'texts, called *ſwabráhmanyá*, depends on actual
'priority of birth; and of twins alſo, *if any ſuch*
'*be conceived* among *different* wives, the eldeſt
'is he, who was firſt actually born.

127. 'He, who has no ſon, may appoint his
'daughter in this manner to raiſe up a ſon for
'him, *ſaying:* "the male child, who ſhall be
"born from her in wedlock, ſhall be mine for
"the purpoſe of performing my obſequies."

128. 'In this manner DACSHA himſelf, lord
'of created beings, anciently appointed all his
'*fifty* daughters to raiſe up ſons to him, for the
'ſake of multiplying his race:

129. 'He gave ten to DHERMA, thirteen to

'CASYAPA, twenty-ſeven to SÓMA, king *of*
'*Bráhmens and medical plants*, after doing ho-
'nour to them with an affectionate heart.

130. 'THE ſon of a man is even as himſelf;
'and as the ſon, ſuch is the daughter *thus ap-*
'*pointed:* how then, *if he have no ſon*, can any
'inherit his property, but a daughter, who is
'cloſely united with his own ſoul?

131. 'Property, given to the mother on
'her marriage, is inherited by her *unmarried*
'daughter; and the ſon of a daughter, *appoint-*
'*ed in the manner juſt mentioned*, ſhall inherit
'the whole eſtate of her father, who leaves no
'ſon *by himſelf begotten:*

132. 'The ſon, however, of *ſuch* a daughter,
'who ſucceeds to all the wealth of her father
'dying without a ſon, muſt offer two funeral
'cakes, one to his own father, and one to the
'father of his mother.

133. 'Between a ſon's ſon and the ſon of
'*ſuch* a daughter, there is no difference in law;
'ſince their father and mother both ſprang
'from the body of the ſame man:

134. 'But, a daughter having been appoint-
'ed to produce a ſon for her father, and a ſon,
'*begotten by himſelf*, being afterwards born, the
'diviſion of the heritage muſt in that caſe be
'equal; ſince there is no right of primogeni-
'ture for a woman.

135. 'Should a daughter, thus appointed to 'raiſe up a ſon for her father, die by any ac- 'cident without a ſon, the huſband of that 'daughter may, without heſitation, poſſeſs him- 'ſelf of her property.

136. 'By that male child, whom a daughter 'thus appointed, either by an implied intention 'or a plain declaration, ſhall produce from an 'huſband of an equal claſs, the maternal grand- 'father becomes in law the father of a ſon: 'let that ſon give the funeral cake and poſſeſs 'the inheritance.

137. 'By a ſon, a man obtains victory over 'all people; by a ſon's ſon, he enjoys immor- 'tality; and, afterwards, by the ſon of that 'grandſon, he reaches the ſolar abode.

138. 'Since the ſon (*tráyaté*) delivers his 'father from the hell named *put*, he was, 'therefore, called *puttra* by BRAHMA' himſelf:

139. 'Now between the ſons of his ſon and 'of his daughter *thus appointed*, there ſubſiſts in 'this world no difference; for even the ſon of '*ſuch* a daughter delivers him in the next, like 'the ſon of his ſon.

140. 'Let the ſon of ſuch a daughter offer 'the firſt funeral cake to his mother; the ſe- 'cond to her father; the third, to her paternal 'grandfather.

141. 'On the man, to whom a ſon has been

'given, *according to a ſubſequent law*, adorned 'with every virtue, that ſon ſhall take *a fifth* '*or ſixth part of* the heritage, though brought 'from a different family.

142. 'A given ſon muſt never claim the 'family and eſtate of his natural father: the 'funeral cake follows the family and eſtate; 'but of him, who has given away his ſon, the 'funeral oblation is extinct.

143. 'THE ſon of a wife, not authorized to 'have iſſue by another, and the ſon begotten, 'by the brother of the huſband, on a wife, who 'has a ſon then living, are both unworthy of 'the heritage; one being the child of an adul-'terer, and the other produced through mere 'luſt.

144. 'Even the ſon of a wife duly authorized, 'not begotten according to the law *already pro-*'*pounded*, is unworthy of the paternal eſtate; 'for he was procreated by an outcaſt:

145. 'But the ſon *legally* begotten on a wife, 'authorized for the purpoſe *before mentioned*, 'may inherit *in all reſpects, if he be virtuous and* '*learned*, as a ſon begotten by the huſband; 'ſince *in that caſe* the ſeed and the produce be-'long of right to the owner of the field.

146. 'He, who keeps a *fixed and moveable* 'eſtate of his *deceaſed* brother, maintains the 'widow, and raiſes up a ſon to that brother,

'muſt give to that ſon, *at the age of fifteen*, the 'whole of his brother's *divided* property.

147. 'Should a wife, even though legally 'authorized, produce a ſon by the brother, or 'any other *ſapinda*, of her huſband, that ſon, if 'begotten with *amorous embraces, and tokens of* 'impure deſire, the ſages proclaim baſeborn 'and incapable of inheriting.

148. 'THIS law, *which has preceded*, muſt be 'underſtood of a diſtribution among ſons be-'gotten on women of the ſame claſs: hear now 'the law concerning *ſons by* ſeveral women of 'different claſſes.

149. 'If there be four wives of a *Bráhmen* 'in the direct order of the claſſes, and ſons are 'produced by them all, this is the rule of par-'tition *among them:*

150. 'The chief ſervant in huſbandry, the 'bull kept for impregnating cows, the riding 'horſe or carriage, the *ring and other* ornaments, 'and the principal meſſuage, ſhall be deducted 'from the inheritance and given to the *Bráh-'men* ſon, together with a larger ſhare by way 'of preeminence.

151. 'Let the *Bráhmen* take three ſhares of 'the reſidue; the ſon of the *Cſhatriyá* wife, 'two ſhares; the ſon of the *Vaiſyá* wife, a ſhare 'and a half; and the ſon of the *Súdra* wife, 'may take one ſhare.

152. 'Or, *if no deduction be made*, let ſome 'perſon learned in the law divide the whole 'collected eſtate into ten parts, and make a 'legal diſtribution by this *following* rule:

153. 'Let the ſon of the *Bráhmaní* take four 'parts; the ſon of the *Cſhatriyá*, three; let the 'ſon of the *Vaiſyá* have two parts; let the ſon 'of the *Súdra* take a ſingle part, *if he be vir-* 'tuous.

154. 'But whether the *Bráhmen* have ſons, 'or have no ſons, *by wives of the three firſt* 'claſſes, no more than a tenth part muſt be 'given to the ſon of a *Súdra*.

155. 'The ſon of a *Bráhmen*, a *Cſhatriyá*, or 'a *Vaiſyá* by a woman of the ſervile claſs, ſhall 'inherit no part of the eſtate, *unleſs he be vir-* 'tuous; *nor jointly with other ſons, unleſs his mo-* 'ther was *lawfully married:* whatever his fa- 'ther may give him, let that be his own.

156. 'All the ſons of twiceborn men, pro- 'duced by wives of the ſame claſs, muſt divide 'the heritage equally, after the younger bro- 'thers have given the firſt born his deducted 'allotment.

157. 'For a *Súdra* is ordained a wife of his 'own claſs, *and* no other: all, produced by her, 'ſhall have equal ſhares, though ſhe have a 'hundred ſons.

158. 'Of the twelve ſons of men, whom

'MENU, ſprung from the Self-exiſtent, has 'named, ſix are kinſmen and heirs; ſix, not 'heirs, *except to their own fathers*, but kinſmen.

159. 'The ſon begotten by a man himſelf '*in lawful wedlock*, the ſon of his wife begotten '*in the manner before deſcribed*, a ſon given *to* '*him*, a ſon made *or adopted*, a ſon of concealed 'birth, *or whoſe real father cannot be known*, and 'a ſon rejected *by his natural parents*, are the 'ſix kinſmen and heirs:

160. 'The ſon of a young woman *unmarried*, 'the ſon of a pregnant bride, a ſon bought, a 'ſon by a twice married woman, a ſon ſelf-'given, and a ſon by a *Súdra*, are the ſix kinſ-'men, but not heirs *to collaterals*.

161. 'Such advantage, as a man would gain, 'who ſhould attempt to paſs deep water in a 'boat made of woven reeds, that father obtains, 'who paſſes the gloom of death, leaving only 'contemptible ſons, *who are the eleven, or at leaſt* '*the ſix, laſt mentioned*.

162. 'If the two heirs of one man be the 'ſon of his own body and a ſon of his wife by 'a kinſman, *the former of whom was begotten* '*after his recovery from an illneſs thought incura-*'*ble*, each of the ſons, excluſively of the other, 'ſhall ſucceed to the whole eſtate of his natural 'father.

163. 'The ſon of his own body is the ſole

'heir to his eſtate, but, that all evil may be re-
'moved, let him allow a maintenance to the
'reſt;

164. 'And, when the ſon of the body has
'taken an account of the paternal inheritance,
'let him give a ſixth part of it to the ſon of
'the wife begotten by a kinſman, *before his fa-*
'*ther's recovery*; or a fifth part, *if that ſon be*
'*eminently virtuous.*

165. 'The ſon of the body, and the ſon of
'the wife may ſucceed *immediately* to the pa-
'ternal eſtate *in the manner juſt mentioned;* but
'the ten other ſons can only ſucceed in order
'to the family duties and to their ſhare of the
'inheritance, *thoſe laſt named being excluded by*
'*any one of the preceding.*

166. 'HIM, whom a man has begotten on
'his own wedded wife, let him know to be the
'firſt in rank, as the ſon of his body.

167. 'He, who was begotten, according to
'law, on the wife of a man deceaſed, or im-
'potent, or diſordered, after due authority given
'to her, is called the lawful ſon of the wife.

168. 'He, whom his father, or mother *with*
'*her huſband's aſſent*, gives to another as his
'ſon, provided that the donee have no iſſue, if
'the boy be of the ſame claſs and affectionately
'diſpoſed, is conſidered as a ſon given, *the gift*
'*being confirmed* by *pouring* water.

169. 'He is conſidered as a ſon made *or* 'adopted, whom a man takes as his own ſon, 'the boy being equal in claſs, endued with filial 'virtues, acquainted with *the* merit *of perform-* 'ing obſequies to his adopter, and with *the* ſin *of* 'omitting them.

170. 'In whoſe manſions ſoever a male 'child ſhall be brought forth *by a married wo-* 'man, whoſe huſband has long been abſent, if the 'real father cannot be diſcovered, *but if it be* 'probable that he was of an equal claſs, that child 'belongs to the lord of the *unfaithful* wife, and 'is called a ſon of concealed birth in his man- 'ſion.

171. 'A boy, whom a man receives as his 'own ſon, after he has been deſerted *with-* 'out juſt cauſe by his parents, or by either of 'them, *if one be dead*, is called a ſon rejected.

172. 'A ſon, whom the daughter of any 'man privately brings forth in the houſe of her 'father, if ſhe *afterwards* marry her lover, is 'deſcribed as a ſon begotten on an unmarried 'girl.

173. 'If a pregnant young woman marry, 'whether her pregnancy be known or unknown, 'the male child in her womb belongs to the 'bridegroom, and is called a ſon received with 'his bride.

174. 'He is called a ſon bought, whom a

'man, for the ſake of having a ſon *to perform his* 'obſequies, purchaſes from his father and mo- 'ther, whether the boy be equal or unequal *to* 'himſelf in good qualities, *for in claſs all adopted* 'ſons muſt be equal.

175. 'He, whom a woman, either forſaken 'by her lord or a widow, conceived by a ſecond 'huſband, whom ſhe took by her own deſire, 'though againſt law, is called the ſon of a wo- 'man twice married:

176. 'If, *on her ſecond marriage*, ſhe be ſtill 'a virgin, or if ſhe left her huſband under the 'age of puberty and return to him at his full 'age, ſhe muſt again perform the nuptial cere- 'mony, *either* with her ſecond, *or her young and* 'deſerted, huſband.

177. 'He, who has loſt his parents, or been 'abandoned *by them* without juſt cauſe, and 'offers himſelf to a man *as his ſon*, is called a 'ſon ſelfgiven.

178. 'A ſon, begotten through luſt on a *Sú-* 'dra by a man of the prieſtly claſs, is even as 'a corpſe, though alive, and is thence called in 'law a living corpſe:

179. 'But a ſon, begotten by a man of the 'ſervile claſs on his female ſlave, or on the fe- 'male ſlave of his male ſlave, may take a 'ſhare of the heritage, if permitted *by the other* 'ſons: thus is the law eſtabliſhed.

180. 'Theſe eleven ſons (the ſon of the wife, 'and the reſt as enumerated) are allowed by 'wiſe legiſlators to be ſubſtitutes *in order* for 'ſons of the body, for the ſake of preventing a 'failure of obſequies;

181. 'Though ſuch, as are called ſons for 'that purpoſe, but were produced from the 'manhood of others, belong in truth to the fa-'ther, from whoſe manhood they ſeverally 'ſprang, and to no other, *except by a juſt fiction* 'of law.

182. 'If, among ſeveral brothers of the 'whole blood, one have a ſon born, Menu 'pronounces them all fathers of a male child 'by means of that ſon; *ſo that, if ſuch nephew* 'would be the heir, the uncles have no power to 'adopt ſons:

183. 'Thus if, among all the wives of the 'ſame huſband, one bring forth a male child, 'Menu has declared them all, by means of 'that ſon, to be mothers of male iſſue.

184. 'On failure of the beſt, *and* of the *next* 'beſt, *among thoſe twelve ſons*, let the inferiour 'in order take the heritage; but, if there be 'many of equal rank, let all be ſharers of the 'eſtate.

185. 'Not brothers, nor parents, but ſons, '*if living, or their male iſſue*, are heirs to the de-'ceaſed, but of him, who leaves no ſon, *nor a*

'*wife, nor a daughter*, the father ſhall take the 'inheritance; and, *if he leave neither father, nor* '*mother*, the brothers.

186. 'To three *anceſtors* muſt water be given 'at their obſequies; for three (*the father, his* '*father, and the paternal grandfather*) is the fu- 'neral cake ordained: the fourth *in deſcent* is 'the giver *of oblations to them, and their heir, if* '*they die without nearer deſcendants*; but the 'fifth has no concern *with the gift of the funeral* '*cake.*

187. 'To the neareſt *ſapinda, male or female,* 'after him in the third degree, the inheritance '*next* belongs; then, on failure of *ſapindas* and 'of their iſſue, the *ſamánódaca*, or diſtant kinſ- 'man, ſhall be the heir; or the ſpiritual pre- 'ceptor, or the pupil, *or the fellowſtudent, of the* '*deceaſed:*

188. 'On failure of all thoſe, the lawful 'heirs are ſuch *Bráhmens*, as have read the 'three *Védas*, as are pure *in body and mind*, as 'have ſubdued their paſſions; *and they muſt* '*conſequently offer the cake:* thus the rites of 'obſequies cannot fail.

189. 'The property of a *Bráhmen* ſhall never 'be taken *as an eſcheat* by the king: this is a 'fixed law: but the wealth of the other claſſes, 'on failure of all heirs, the king may take.

190. 'If the widow of a man, who died

'without a ſon, raiſe up a ſon to him by one of 'his kinſmen, let her deliver to that ſon, *at his* '*full age*, the collected eſtate of the deceaſed, 'whatever it be.

191. 'If two ſons, begotten by two *ſucceſſive* '*huſbands, who are both dead*, contend for their 'property, then in the hands of their mother, 'let each take, excluſively of the other, his own 'father's eſtate.

192. 'On the death of the mother, let all 'the uterine brothers, and the uterine ſiſters, *if* '*unmarried*, equally divide the maternal eſtate: '*each married ſiſter ſhall have a fourth part of a* '*brother's allotment.*

193. 'Even to the daughters of thoſe 'daughters, it is fit, that ſomething ſhould be 'given, from the aſſets of their maternal grand-'mother, on the ſcore of natural affection.

194. 'What was given before the nuptial 'fire, what was given on the bridal proceſſion, 'what was given in token of love, and what 'was received from a brother, a mother, or a 'father, are conſidered as the ſixfold *ſeparate* 'property of a *married* woman:

195. 'What ſhe received after marriage 'from the family of her huſband, and what 'her affectionate lord may have given her, ſhall 'be inherited, even if ſhe die in his lifetime, by 'her children.

196. 'It is ordained, that the property of a 'woman, married by the ceremonies called '*Bráhma*, *Daiva*, *Árſha*, *Gándharva*, or *Prá-* '*jápatya*, ſhall go to her huſband, if ſhe die 'without iſſue.

197. 'But her wealth given on the marriage 'called *Áſura*, or on either of the *two* others, is 'ordained, on her death without iſſue, to be- 'come the property of her father and mother.

198. 'If a widow, *whoſe huſband had other* '*wives of different claſſes*, ſhall have received 'wealth at any time *as a gift* from her father, '*and ſhall die without iſſue*, it ſhall go to the 'daughter of the *Bráhmaní* wife, or to the iſſue 'of that daughter.

199. 'A woman ſhould never make a hoard 'from the goods of her kindred, *which are* 'common to *her and* many; or even from the 'property of her lord, without his aſſent.

200. 'Such ornamental apparel, as women 'wear during the lives of their huſbands, the 'heirs of thoſe huſbands ſhall not divide among 'themſelves: they, who divide it among them- 'ſelves, fall deep *into ſin*.

201. 'Eunuchs and outcaſts, perſons born 'blind or deaf, madmen, idiots, the dumb, and 'ſuch as have loſt the uſe of a limb, are excluded 'from a ſhare of the heritage;

202. 'But it is juſt, that the heir, who

'knowe his duty, ſhould give all of them food 'and raiment *for life* without ſtint, according to 'the beſt of his power: he, who gives them 'nothing, ſinks aſſuredly *to a region of puniſh-* 'ment.

203. 'If the eunuch and the reſt ſhould at 'any time deſire to marry, *and if the wife of the* 'eunuch *ſhould raiſe up a ſon to him by a man le-* 'gally appointed, *that ſon and* the iſſue of ſuch, 'as have children, ſhall be capable of inheriting.

204. 'After the death of the father, if the 'eldeſt brother acquire *wealth by his own efforts* 'before partition, a ſhare of that *acquiſition* ſhall 'go to the younger brothers, if they have made 'a due progreſs in learning;

205. 'And if all of them, being unlearned, 'acquire property *before partition* by their own 'labour, there ſhall be an equal diviſion of that 'property *without regard to the firſt born*; for it 'was not the wealth of their father: this rule is 'clearly ſettled.

206. 'Wealth, however, acquired by learn- 'ing, belongs excluſively to any one *of them,* 'who acquired it; ſo does any thing given by a 'friend, received on account of marriage, or 'preſented as a mark of reſpect to a gueſt.

207. 'If any one of the brethren has a com- 'petence from his own occupation, and wants 'not the property *of his father*, he may debar

'himſelf from his own ſhare, ſome trifle being 'given him as a conſideration, *to prevent future* 'ſtrife.

208. 'What a brother has acquired by la- 'bour or ſkill, without uſing the patrimony, he 'ſhall not give up without his aſſent; for it was 'gained by his own exertion:

209. 'And if a ſon, by his own efforts, re- 'cover *a debt or property unjuſtly detained*, which 'could not be recovered before *by his father*, he 'ſhall not, unleſs by his free will, put it into 'parcenary with his brethren, ſince in fact it 'was acquired by himſelf.

210. 'If brethren, once divided and living 'again together as parceners, make a ſecond 'partition, the ſhares muſt in that caſe be 'equal; and the firſt born ſhall have no right of 'deduction.

211. 'Should the eldeſt or youngeſt of ſeve- 'ral brothers be deprived of his ſhare *by a civil* 'death on his entrance into the fourth order, 'or ſhould any one of them die, his *veſted inter-* 'eſt in a ſhare ſhall not wholly be loſt;

212. 'But, *if he leave neither ſon, nor wife,* 'nor daughter, nor father, nor mother, his uter- 'ine brothers and ſiſters, and ſuch brothers as 'were reunited after a ſeparation, ſhall aſſemble 'and divide his ſhare equally.

213. 'Any eldeſt brother, who from avarice 'ſhall defraud his younger brother, ſhall forfeit

'*the honours of* his primogeniture, be deprived 'of his own ſhare, and pay a fine to the king.

214. 'All thoſe brothers, who are addicted 'to any vice, loſe their title to the inheritance: 'the firſt born ſhall not appropriate it to him-'ſelf, but ſhall give ſhares to the youngeſt, *if* '*they be not vitious.*

215. 'If, among undivided brethren *living* 'with their father, there be a common exertion 'for common gain, the father ſhall never make 'an unequal diviſion among them, *when they* '*divide their families.*

216. 'A ſon, born after a diviſion *in the* '*lifetime of his father*, ſhall alone inherit the 'patrimony, or ſhall have a ſhare of it with the 'divided brethren, if they return and unite 'themſelves with him.

217. 'Of a ſon, dying childleſs *and leaving* 'no *widow*, the *father and* mother ſhall take the 'eſtate; and, the mother alſo being dead, the 'paternal *grandfather and* grandmother ſhall 'take the heritage *on failure of brothers and ne-*'*phews.*

218. 'When all the debts and wealth have 'been juſtly diſtributed according to law, any 'property, that may afterwards be diſcovered, 'ſhall be ſubject to a ſimilar diſtribution.

219. 'Apparel, carriages, or riding horſes, 'and ornaments *of ordinary value, which any of* '*the heirs had uſed by conſent before partition*,

'dreſſed rice, water *in a well or ciſtern*, female 'ſlaves, family prieſts, or ſpiritual counſellors, 'and paſture ground for cattle, the wife have 'declared indiviſible, *and ſtill to be uſed as be-* '*fore.*

220. 'Thus have the laws of inheritance, 'and the rule for the conduct of ſons (whether 'the ſon of the wife or others) been expound- 'ed to you in order: learn at preſent the law 'concerning games of chance.

221. 'GAMING, either with inanimate or 'with animated things, let the king exclude 'wholly from his realm: both thoſe modes of 'play cauſe deſtruction to princes.

222. 'Such play with dice *and the like*, or by 'matches *between rams and cocks*, amounts to 'open theft; and the king muſt ever be vigilant 'in ſuppreſſing both *modes of play:*

223. 'Gaming with lifeleſs things is known 'among men by the name of *dyúta*; but *ſa-* '*máhwaya* ſignifies a match between living 'creatures.

224. 'Let the king puniſh corporally at diſ- 'cretion both the gameſter and the keeper of a 'gaming houſe, whether they play with inani- 'mate or animated things: and men of the 'ſervile claſs, who wear the *ſtring and other* 'marks of the twiceborn.

225. 'Gameſters, publick dancers and ſing-

'ers, revilers of ſcripture, open hereticks, men 'who perform not the duties of their ſeveral 'claſſes, and ſellers of ſpirituous liquor, let him 'inſtantly baniſh from the town:

226. 'Thoſe wretches, lurking like unſeen 'thieves in the dominion of a prince, conti-'nually haraſs his good ſubjects with their viti-'ous conduct.

227. 'Even in a former creation was this '*vice of* gaming found a great provoker of en-'mity; let no ſenſible man, therefore, addict 'himſelf to play even for his amuſement:

228. 'On the man addicted to it, either pri-'vately or openly, let puniſhment be inflicted 'at the diſcretion of the king.

229. 'A MAN of the military, commercial, 'or ſervile claſs, who cannot pay a fine, ſhall 'diſcharge the debt by his labour: a prieſt ſhall 'diſcharge it by little and little,

230. 'For women, children, perſons of crazy 'intellect, the old, the poor, and the infirm, 'the king ſhall order puniſhment with a ſmall 'whip, a twig, or a rope.

231. 'THOSE miniſters, who are employed 'in publick affairs, and, inflamed by the blaze 'of wealth, mar the buſineſs of any perſon 'concerned, let the king ſtrip of all their pro-'perty.

232. 'Such, as forge royal edicts, cauſe diſ-

'ſenſions among the great miniſters, or kill 'women, prieſts, or children, let the king put 'to death; and ſuch, as adhere to his enemies.

233. 'Whatever buſineſs has at any time 'been tranſacted conformably to law, let him 'conſider as finally ſettled, and refuſe to un-'ravel;

234. 'But whatever buſineſs has been con-'cluded illegally by his miniſters or by a judge, 'let the king himſelf reexamine; and let him 'fine them each a thouſand *panas*.

235. 'The ſlayer of a prieſt, a ſoldier or 'merchant drinking arak, or a prieſt drinking 'arak, mead, or rum, he, who ſteals the gold of 'a prieſt, and he, who violates the bed of his '*natural or ſpiritual* father, are all to be con-'ſidered reſpectively as offenders in the higheſt 'degree, *except thoſe, whoſe crimes are not fit to* '*be named:*

236. 'On ſuch of thoſe four, as have not 'actually performed an expiation, let the king 'legally inflict corporal puniſhment, together 'with a fine.

237. 'For violating the paternal bed, let *the* '*mark of* a female part be impreſſed *on the fore-*'*head with hot iron*; for drinking ſpirits, a vint-'ner's flag; for ſtealing ſacred gold, a dog's 'foot; for murdering a prieſt, *the figure of* a 'headleſs corpſe;

238. 'With none to eat with them, with 'none to ſacrifice with them, with none to 'read with them, with none to be allied by 'marriage to them, abject and excluded from 'all ſocial duties, let them wander over this 'earth:

239. 'Branded with *indelible* marks, they 'ſhall be deſerted by their paternal and mater-'nal relations, treated by none with affection, 'received by none with reſpect: ſuch is the or-'dinance of MENU.

240. '*Criminals of* all the claſſes, having 'performed an expiation, as ordained by law, 'ſhall not be marked on the forehead, but con-'demned to pay the higheſt fine:

241. 'For crimes by a prieſt, *who had a* '*good character before his offence*, the middle 'fine ſhall be ſet on him; or, *if his crime was* '*premeditated*, he ſhall be baniſhed from the 'realm, *taking* with *him* his effects and his fa-'mily;

242. 'But men of the other claſſes, who 'have committed thoſe crimes, *though without* '*premeditation*, ſhall be ſtripped of all their poſ-'ſeſſions; and, if their offence was premedi-'tated, ſhall be corporally, or even capitally, 'puniſhed, *according to circumſtances.*

243. 'LET no virtuous prince appropriate 'the wealth of a criminal in the higheſt degree;

'for he, who appropriates it through covetouſ-
'neſs, is contaminated with the ſame guilt:

244. 'Having thrown ſuch a fine into the
'waters, let him offer it to VARUNA; or let
'him beſtow it on ſome prieſt of eminent learn-
'ing in the ſcriptures:

245. 'VARUNA is the lord of puniſhment;
'he holds a rod even over kings; and a prieſt,
'who has gone through the whole *Véda*, is
'*equal* to a ſovereign of all the world.

246. 'Where the king abſtains from receiv-
'ing *to his own uſe* the wealth of ſuch offenders,
'there children are born in due ſeaſon and en-
'joy long lives;

247. '*There* the grain of huſbandmen riſes
'abundantly, as it was reſpectively ſown; there
'no younglings die, nor is one deformed ani-
'mal born,

248. 'SHOULD a man of the baſeſt claſs,
'with preconceived malice, give pain to *Bráh-*
'*mens*, let the prince corporally puniſh him by
'various modes, that may raiſe terrour.

249. 'A king is pronounced equally unjuſt
'in releaſing the man, who deſerves puniſh-
'ment, and in puniſhing the man, who de-
'ſerves it not: he is juſt, who always inflicts
'the puniſhment ordained by law.

250. 'Theſe eſtabliſhed rules for adminiſter-
'ing juſtice, between two litigant parties, have

'been propounded at length under eighteen 'heads.

251. 'THUS fully performing all duties re- 'quired by law, let a king ſeek *with juſtice* to 'poſſeſs regions yet unpoſſeſſed, and, when 'they are in his poſſeſſion, let him govern them 'well.

252. 'His realm being completely arranged 'and his fortreſſes amply provided, let him ever 'apply the moſt diligent care to eradicate *bad* 'men reſembling thorny weeds, as the law di- 'rects.

253. 'By protecting ſuch as live virtuouſly, 'and by rooting up ſuch as live wickedly, thoſe 'kings, whoſe hearts are intent on the ſecurity 'of their people, ſhall riſe to heaven.

254. 'Of that prince, who takes a revenue, 'without reſtraining rogues, the dominions are 'thrown into diſorder, and himſelf ſhall be pre- 'cluded from a celeſtial abode;

255. 'But of him, whoſe realm, by the 'ſtrength of his arm, is defended and free from 'terrour, the dominions continually flouriſh, 'like trees duly watered.

256. 'LET the king, whoſe emiſſaries are 'his eyes, diſcern well the two ſorts of rogues, 'the open and the concealed, who deprive 'other men of their wealth:

257. 'Open rogues are they, who ſubſiſt by

'cheating in various marketable commodities;
'and concealed rogues are they, who ſteal and
'rob in foreſts and the like ſecret places.

258. 'Receivers of bribes, extorters of mo-
'ney by threats, debaſers of metals, gameſters,
'fortunetellers, impoſters, and profeſſors of pal-
'miſtry;

259. 'Elephant breakers and quacks, not per-
'forming what they engage to perform, pre-
'tended artiſts, and ſubtil harlots;

260. 'Theſe and the like thorny weeds;
'overſpreading the world, let the king diſcover
'with a quick ſight, and others, who act ill in
'ſecret; worthleſs men, yet bearing the out-
'ward ſigns of the worthy.

261. 'Having detected them, by the means
'of truſty perſons diſguiſed, who *pretend to*
'have the ſame occupation with them, and of
'ſpies placed in ſeveral ſtations, let him bring
'them by artifice into his power:

262. 'Then, having fully proclaimed their
'reſpective criminal acts, let the king inflict
'puniſhment legally, according to the crimes
'proved;

263. 'Since, without certain puniſhment, it
'is impoſſible to reſtrain the delinquency of
'ſcoundrels with depraved ſouls, who ſecretly
'prowl over this earth.

264. 'Muchfrequented places, ciſterns of

'water, bake houſes, the lodgings of harlots,
'taverns and victualling ſhops, ſquares where
'four ways meet, large well known trees,
'aſſemblies, and publick ſpectacles;

265. 'Old courtyards, thickets, the houſes
'of artiſts, empty manſions, groves, and gar-
'dens;

266. 'Theſe and the like places let the king
'guard, for the prevention of robberies, with
'ſoldiers, both ſtationary and patroling, as well
'as with ſecret watchmen.

267. 'By the means of able ſpies, once
'thieves *but reformed*, who, well knowing the
'various machinations of rogues, aſſociate with
'them and follow them, let the king detect and
'draw them forth:

268. 'On pretexts of dainty food and gra-
'tifications, or of ſeeing ſome wiſe prieſt, *who*
'*could enſure their ſucceſs*, or on pretence of
'*mock battles and the like* feats of ſtrength, let
'the ſpies procure an aſſembly of thoſe men.

269. 'Such as refuſe to go forth on thoſe oc-
'caſions, deterred by *former puniſhments, which*
'the king *had inflicted*, let him *ſeize* by force,
'*and* put to death, *on proof of their guilt*, with
'their friends and kinſmen, paternal and ma-
'ternal, *if proved to be their confederates.*

270. 'Let not a juſt prince kill a man con-
'victed of ſimple theft, unleſs taken with the

'mainer or with implements of robbery; but 'any thief, taken with the mainer, or with 'ſuch implements, let him deſtroy without he-'ſitation;

271. 'And let him ſlay all thoſe, who give 'robbers food in towns, or ſupply them with 'implements, or afford them ſhelter.

272. 'Should thoſe men, who are appointed 'to guard any diſtricts, or thoſe of the vicinity, 'who were employed for that purpoſe, be neu-'tral in attacks by robbers *and inactive in ſeiz-'ing them*, let him inſtantly puniſh them as 'thieves.

273. 'Him, who lives *apparently* by the 'rules of his claſs, but *really* departs from thoſe 'rules, let the king ſeverely puniſh by fine, as a 'wretch, who violates his duty.

274. 'They, who give no aſſiſtance on the 'plundering of a town, on the forcible breaking 'of a dike, or on ſeeing a robbery on the high-'way, ſhall be baniſhed with their cattle and 'utenſils.

275. 'Men, who rob the king's treaſure, or 'obſtinately oppoſe his commands, let him de-'ſtroy by various modes of juſt puniſhment; 'and thoſe, who encourage his enemies.

276. 'Of robbers, who break a wall or 'partition, and commit theft in the night, let

'the prince order the hands to be lopped off,
'and themſelves to be fixed on a ſharp ſtake.

277. 'Two fingers of a cutpurſe, *the thumb*
'*and the index*, let him cauſe to be amputated
'on his firſt conviction; on the ſecond, one
'hand and one foot; on the third, he ſhall ſuffer
'death.

278. 'Such, as give thieves fire, ſuch as give
'them food, ſuch as give them arms and apart-
'ments, and ſuch as knowingly receive a thing
'ſtolen, let the king puniſh as *he would puniſh* a
'thief.

279. 'The breaker of a *dam to ſecure a* pool,
'let him puniſh by long immerſion under
'water or by keen corporal ſuffering; or the of-
'fender ſhall repair it, but muſt pay the higheſt
'mulct.

280. 'Thoſe, who break open the treaſury,
'or the arſenal, or the temple of a deity, and
'thoſe, who carry off royal elephants, horſes,
'or cars, let him without heſitation deſtroy.

281. 'He, who ſhall take away the water of
'an ancient pool, or ſhall obſtruct a watercourſe,
'muſt be condemned to pay the loweſt uſual
'amercement.

282. 'He, who ſhall drop his ordure on the
'king's highway, except in caſe of neceſſity,
'ſhall pay two *panas* and immediately remove
'the filth;

283. 'But a perſon in urgent neceſſity, a 'very old man, a pregnant woman, and a child, 'only deſerve reproof, and ſhall clean the place 'themſelves: that is a ſettled rule.

284. 'ALL phyſicians and ſurgeons acting 'unſkilfully in their ſeveral profeſſions, muſt 'pay for *injury to* brute animals the loweſt, but 'for *injury to* human creatures the middle, 'amercement.

285. 'THE breaker of a footbridge, of a pub-'lick flag, of a paliſade, and of idols *made of* 'clay, ſhall repair what he has broken, and pay 'a mulct of five hundred *panas*.

286. 'FOR mixing impure with pure com-'modities, for piercing fine gems, *as diamonds* 'or rubies, and for boring *pearls or inferiour* 'gems improperly, the fine is the loweſt of the 'three; *but damages muſt always be paid.*

287. 'THE man, who ſhall deal unjuſtly 'with purchaſers at a fair price *by delivering* 'goods of leſs value, or ſhall ſell at a high price 'goods of ordinary value, ſhall pay *according to* 'circumſtances, the loweſt or the middle amerce-'ment.

288. 'LET the king place all priſons near a 'publick road, where offenders may be ſeen 'wretched or disfigured.

289. 'HIM, who breaks down a *publick* 'wall, him, who fills up a *publick* ditch, him,

'who throws down a *publick* gate, the king ſhall 'ſpeedily baniſh.

290. 'FOR all ſacrifices to deſtroy innocent 'men, the puniſhment is a fine of two hundred '*panas*; and for machinations with *poiſonous* 'roots, and for the various *charms and* witch-'eries *intended* to kill, by perſons not effecting 'their purpoſe.

291. 'THE ſeller of bad grain for good, or of 'good ſeed placed at the top *of the bag, to con-'ceal the bad below*, and the deſtroyer of known 'landmarks, muſt ſuffer ſuch corporal puniſh-'ment as will diſfigure them;

292. 'But the moſt pernicious of all de-'ceivers is a goldſmith, who commits frauds: 'the king ſhall order him to be cut piecemeal 'with razors.

293. 'FOR ſtealing implements of huſban-'dry, weapons, and prepared medicines, let 'the king award puniſhment according to the 'time and according to their uſe.

294. 'THE king, and his council, his me-'tropolis, his realm, his treaſure, and his army, 'together with his ally, are the ſeven members 'of his kingdom; *whence* it is called *Septánga:*

295. 'Among thoſe ſeven members of a 'kingdom, let him conſider the ruin of the 'firſt, and ſo forth in order, as the greateſt ca-'lamity;

296. 'Yet, in a ſevenparted kingdom here 'below, there is no ſupremacy among the ſe-'veral parts, from any preeminence in uſeful 'qualities: but all the parts muſt reciprocally 'ſupport each other, like the three ſtaves of a 'holy mendicant:

297. 'In theſe and thoſe acts, *indeed*, this 'and that member may be diſtinguiſhed; *and* 'the member, by which any affair is tranſ-'acted, has the preeminence in that particular 'affair.

298. 'When the king employs emiſſaries, 'when he exerts power, when he regulates 'publick buſineſs, let him invariably know both 'his own ſtrength and that of his enemy,

299. 'With all *their ſeveral* diſtreſſes and 'vices: let him then begin his operations, hav-'ing maturely conſidered the greater and leſs 'importance *of particular acts:*

300. 'Let him, *though frequently diſappointed*, 'renew his operations, how fatigued ſoever, 'again and again: ſince fortune always attends 'the man, who, *having begun well*, ſtrenuouſly 'renews his efforts.

301. 'All the ages, called *Satya*, *Tréta*, *Dwápara*, and *Cali*, depend on the conduct of 'the king; who is declared *in turn* to repreſent 'each of thoſe ages:

302. 'Sleeping, he is the *Cali* age; waking

'the *Dwápara;* exerting himſelf in action, the 'Tréta; living virtuouſly, the *Satya.*

303. 'Of INDRA, of SU'RYA, of PAVANA, 'of YAMA, of VARUNA, of CHANDRA, of 'AGNI, and of PRI'T'HIVI, let the king emulate 'the power and attributes.

304. 'As INDRA ſheds plentiful ſhowers 'during the four rainy months, thus let him, 'acting like the regent of clouds, rain juſt gra-'tifications over his kingdom:

305. 'As SU'RYA with ſtrong rays draws up 'the water during eight months, thus let him, 'performing the function of the ſun, gradually 'draw from his realm the legal revenue:

306. 'As PAVANA, when he moves, per-'vades all creatures, thus let him, imitating 'the regent of wind, pervade *all places* by his 'concealed emiſſaries:

307. 'As YAMA, at the appointed time, 'puniſhes friends and foes, *or thoſe who revere, 'and thoſe who contemn, him,* thus let the king, 'reſembling the judge of departed ſpirits, 'puniſh offending ſubjects:

308. 'As VARUNA moſt aſſuredly binds the 'guilty in fatal cords, thus let him, repreſent-'ing the genius of water, keep offenders in 'cloſe confinement:

309. 'When the people are no leſs delighted 'on ſeeing the king, than on ſeeing the full

'moon, he appears in the character of CHAN-
'DRA:

310. 'Againſt criminals let him ever be ar-
'dent in wrath, let him be ſplendid in glory,
'let him conſume wicked miniſters, thus
'emulating the functions of AGNI, regent of
'fire.

311. 'As PRĬT'HIVÌ ſupports all creatures
'equally, thus a king, ſuſtaining all ſubjects,
'reſembles in his office the goddeſs of earth.

312. 'Engaged in theſe duties and in others,
'with continual activity, let the king *above all*
'*things* reſtrain robbers, both in his own terri-
'tories and in thoſe of other princes, *from which*
'*they come, or in which they ſeek refuge.*

313. 'LET him not, although in the great-
'eſt diſtreſs *for money*, provoke *Brâhmens* to
'anger *by taking their property*; for they, once
'enraged, could immediately *by ſacrifices and*
'*imprecations* deſtroy him with his troops, ele-
'phants, horſes and cars.

314. 'Who, without periſhing, could pro-
'voke thoſe holy men, by whom, *that is, by*
'*whoſe anceſtors, under* BRAHMA', the allde-
'vouring fire was created, the ſea with waters
'not drinkable, and the moon with its wane
'and increaſe?

315. 'What prince could gain wealth by
'oppreſſing thoſe, who, if angry, could frame

'other worlds and regents of worlds, could give 'being to new gods and mortals?

316. 'What man, deſirous of life, would 'injure thoſe, by the aid of whom, *that is, by 'whoſe oblations*, worlds and gods perpetually 'ſubſiſt; thoſe who are rich in the learning of 'the *Véda?*

317. 'A *Bráhmen*, whether learned or igno-'rant, is a powerful divinity; even as fire is a 'powerful divinity, whether conſecrated or 'popular.

318. 'Even in places for burning the dead, 'the bright fire is undefiled; and, when pre-'ſented with clarified butter at *ſubſequent* ſacri-'fices, blazes again with extreme ſplendour:

319. 'Thus, although *Bráhmens* employ 'themſelves in all ſorts of mean occupation, 'they muſt invariably be honoured; for they 'are ſomething tranſcendently divine.

320. 'Of a military man, who raiſes his 'arm violently on all occaſions againſt the 'prieſtly claſs, the prieſt himſelf ſhall be the 'chaſtiſer; ſince the ſoldier originally proceed-'ed from the *Bráhmen.*

321. 'From the waters aroſe fire; from the 'prieſt, the ſoldier; from ſtone, iron: their all-'penetrating force is ineffectual in the places, 'whence they reſpectively ſprang.

322. 'The military claſs cannot proſper

'without the ſacerdotal, nor can the ſacerdotal 'be raiſed without the military: both claſſes, by 'cordial union, are exalted in this world and 'in the next.

323. 'SHOULD the king *be near his end through 'ſome incurable diſeaſe, he* muſt beſtow on the 'prieſts all his riches accumulated from legal 'fines; and, having duly committed his king-'dom to his ſon, let him ſeek death in battle, *or, 'if there be no war, by abſtaining from food.*

324. 'Thus conducting himſelf, *and* ever 'firm in diſcharging his royal duties, let the king 'employ all his miniſters in acts beneficial to his 'people.

325. 'Theſe rules for the conduct of a mi-'litary man having been propounded, let man-'kind next hear the rules for the commercial 'and ſervile claſſes in due order.

326. 'LET the *Vaiſya*, having been girt with 'his proper ſacrificial thread, and having mar-'ried an equal wife, be always attentive to his 'buſineſs *of agriculture and trade*, and to that of 'keeping cattle;

327. 'Since the lord of created beings, hav-'ing formed herd, and flocks, intruſted them to 'the care of the *Vaiſya*, while he intruſted the 'whole human ſpecies to the *Bráhmen* and the '*Cſhatriya:*

328. 'Never muſt a *Vaiſya* be diſpoſed to ſay,

'I keep no cattle;" nor, he being willing to
'keep them, muſt they by any means be kept
'by men of another claſs.

329. 'Of gems, pearls, and coral, of iron,
'of woven cloth, of perfumes and of liquids, let
'him well know the prices both high and low:

330. 'Let him be ſkilled likewiſe in *the time*
'*and manner of* ſowing ſeeds, and in the bad or
'good qualities of land; let him alſo perfectly
'know the correct modes of meaſuring and
'weighing,

331. 'The excellence or defects of commo-
'dities, the advantages and diſadvantages of
'different regions, the probable gain or loſs on
'vendible goods, and the means of breeding
'cattle with large augmentation:

332. 'Let him know the juſt wages of ſer-
'vants, the various dialects of men, the beſt
'way of keeping goods, and *whatever elſe be-*
'*longs to* purchaſe and ſale.

333. 'Let him apply the moſt vigilant care
'to augment his wealth by *performing* his duty;
'and, with great ſolicitude, let him give nou-
'riſhment to all ſentient creatures.

334. 'SERVILE attendance on *Bráhmens*
'learned in the *Véda*, chiefly on ſuch as keep
'houſe and are famed for virtue, is of itſelf the
'higheſt duty of a *Súdra*, and leads him to
'future beatitude;

335. 'Pure *in body and mind*, humbly ſerving 'the three higher claſſes, mild in ſpeech, never 'arrogant, ever ſeeking refuge in *Bráhmens* 'principally, he may attain the moſt eminent 'elaſs *in another tranſmigration.*

336. 'THIS clear ſyſtem of duties has been 'promulgated for the four claſſes, when they 'are not in diſtreſs for ſubſiſtence; now learn 'in order their ſeveral duties in times of neceſ-'ſity.'

CHAPTER THE TENTH.

On the mixed Claſſes; and on Times of Diſtreſs.

1. 'LET the three twiceborn claſſes, remaining firm in their ſeveral duties, carefully read the *Vêda*; but a *Bráhmen* muſt explain it to them, not *a man of* the other two *claſſes:* this is an eſtabliſhed rule.

2. 'The *Bráhmen* muſt know the means of ſubſiſtence ordained by law for all the claſſes, and muſt declare them to the reſt: let himſelf likewiſe act in conformity *to law.*

3. 'From priority of birth, from ſuperiority of origin, from a more exact knowledge of ſcripture, and from a diſtinction in the ſacrificial thread, the *Bráhmen* is the lord of all claſſes.

4. 'The three twiceborn claſſes are the ſacerdotal, the military, and the commercial; but the fourth, or ſervile, is onceborn, *that is, has no ſecond birth from the* gáyatrí, *and wears no thread:* nor is there a fifth pure claſs.

5. 'IN all claſſes they, and they only, who are born, in a direct order, of wives equal in

'claſs and virgins at the time of marriage, are 'to be conſidered as the ſame in claſs *with their* 'fathers:

6. 'Sons, begotten by twiceborn men, on 'women of the claſs next immediately below 'them, wiſe legiſlators call ſimilar, *not the ſame,* 'in claſs *with their parents,* becauſe they are 'degraded, *to a middle rank between both,* by the 'lowneſs of their mothers: *they are named in* 'order, Múrdhábhiſhicta, Máhiſhya, *and* Ca-'rana, *or* Cáyaſt'ha; *and their ſeveral employ-*'ments are teaching military exerciſes; muſick, 'aſtronomy, *and keeping herds; and attendance on* 'princes.

7. 'Such is the primeval rule for the ſons 'of women one degree lower *than their huſbands:* 'for the ſons of women two or three degrees 'lower, let this rule of law be known.

8. 'From a *Bráhmen,* on a wife of the *Vaiſya* 'claſs, is born a ſon called *Ambaſht'ha,* or '*Vaidya,* on a *Súdra* wife a *Niſháda,* named 'alſo *Páraſáva:*

9. 'From a *Cſhatriya,* on a wife of the *Súdra* 'claſs, ſprings a creature, called *Ugra,* with a 'nature partly warlike and partly ſervile, fero-'cious in his manners, cruel in his acts.

10. 'The ſons of a *Bráhmen* by *women of* 'three *lower* claſſes, of a *Cſhatriya* by *women of* 'two, and of a *Vaiſya* by one *lower* claſs, are

'called *apaſadáh*, or degraded *below their fa-*
'*thers*.

11. 'From a *Cſhatriya*, by a *Bráhmeni* wife,
'ſprings a *Súta* by birth; from a *Vaiſya*, by a
'military or ſacerdotal wife, ſpring a *Mágadha*
'and a *Vaidéha*.

12. 'From a *Súdra*, on women of the com-
'mercial, military, and prieſtly claſſes, are born
'ſons of a mixed breed, called *A'yógava*, *Cſhat-*
'*triĭ*, and *Chandála*, the loweſt of mortals.

13. 'As the *Ambaſht'ha* and *Ugra*, born in
'a direct order with one claſs between *thoſe of*
'*their parents*, are conſidered in law, ſo are the
'*Cſhattriĭ* and the *Vaidéha*, born in an inverſe
'order *with one intermediate claſs*; *and all four*
'*may be touched without impurity*.

14. 'Thoſe ſons of the twiceborn, who are
'begotten on women without an interval (*An-*
'*tara*) between the claſſes mentioned in order,
'the wife called *Anantaras*, giving them a *di-*
'*ſtinct* name from the lower degree of their
'mothers.

15. 'From a *Bráhmen*, by a girl of the *Ugra*
'tribe, is born an *A'vriĭta*; by one of the *Am-*
'*baſt'ha* tribe, an *Abhíra*; by one of the *A'yó-*
'*gava* tribe, a *Dhigvana*.

16. 'The *A'yógava*, the *Cſhattriĭ*, and the
'*Chandála*, the loweſt of men, ſpring from a
'*Súdra* in an inverſe order *of the claſſes*, and

'are, *therefore*, all three excluded *from the per-*
'*formance of obſequies to their anceſtors:*

17. 'From a *Vaiſya* the *Mágadha* and *Vaidé-*
'*ha*, from a *Cſhatriya* the *Súta* only, are born
'in an inverſe order; and they are three other
'ſons excluded *from funeral rites to their fathers.*

18. 'The ſon of a *Niſháda*, by a woman of
'the *Súdra* claſs, is by tribe a *Puccaſa*; but the
'ſon of a *Súdra* by a *Niſhádí* woman, is named
'*Cuccutaca.*

19. 'One, born of a *Cſhattrí* by an *Ugrá*, is
'called *Swapáca*; and one, begotten by a *Vaidé-*
'*ha* on an *Ambaſhthí* wife, is called *Véna.*

20. 'Thoſe, whom the twiceborn beget on
'women of equal claſſes, but who perform not
'the proper ceremonies *of aſſuming the thread,*
'*and the like*, people denominate *Vrátyas*, or
'excluded from the *gáyatrí.*

21. 'From ſuch an outcaſt *Bráhmen* ſprings
'a ſon of a ſinful nature, *who in different coun-*
'*tries is* named a *Bhúrjacantaca*, an *A'vantya*,
'a *Vátadhána*, a *Puſhpadha*, and a *Saic'ha:*

22. 'From ſuch an outcaſt *Cſhatriya* comes
'a ſon called a *J'halla*, a *Malla*, a *Nich'hivi*, a
'*Nata*, a *Carana*, a *C'haſa*, and a *Dravira:*

23. 'From ſuch an outcaſt *Vaiſya* is born a
'ſon called *Sudhanwan*, *Chárya*, *Cáruſha*, *Vi-*
'*janman*, *Maitra*, and *Satwata.*

24. 'By intermixtures of the claſſes, by their

'marriages with women who ought not to be 'married, and by their omiſſion of preſcribed 'duties, impure claſſes have been formed.

25. 'THOSE men of mingled births, who 'were born in the inverſe order of claſſes, and 'who intermarry among themſelves, I will now 'compendiouſly deſcribe.

26. 'The *Súta*, the *Vaidéha*, and the *Chan-'dála*, that loweſt of mortals, the *Mágadha*, the '*Cſhattrí* by tribe, and the *Áyógava*,

27. 'Theſe ſix beget ſimilar ſons on women 'of their own claſſes, or on women of the ſame 'claſs with their mothers; and they produce 'the like from women of the two higheſt 'claſſes, *and of the loweſt:*

28. 'As a twiceborn ſon may ſpring from a '*Bráhmen* by women of two claſſes out of 'three, *a ſimilar ſon*, when there is no interval, 'and *an equal ſon* from a woman of his own 'claſs, it is thus in the caſe of the low tribes 'in order.

29. 'Thoſe ſix beget, on women of their 'own tribes, reciprocally, very many deſpica-'ble and abject races even more foul than their 'begetters.

30. 'Even as a *Súdra* begets, on a *Bráhmení* 'woman, a ſon more vile than himſelf, thus 'any other low man begets, on *woman of* the 'four claſſes, a ſon yet lower.

31. 'The ſix low claſſes, marrying inverſely, 'beget fifteen yet lower tribes, the baſe pro- 'ducing ſtill baſer; *and in a direct order they* 'produce *fifteen more.*

32. 'A *Daſyu*, or outcaſt of any pure claſs, 'begets on an *Áyógavì* woman a *Sairindhra*, 'who ſhould know how to attend and to dreſs 'his maſter; though not a ſlave, he muſt live 'by ſlaviſh work, and may alſo gain ſubſiſtence 'by catching wild beaſts in toils:

33. 'A *Vaidéha* begets on her a ſweetvoiced '*Maitréyaca*, who, ringing a bell at the ap- 'pearance of dawn, continually praiſes great 'men:

34. 'A *Niſháda* begets on her a *Márgava*, 'or *Dáſa*, who ſubſiſts by his labour in boats, 'and is named *Caiverta* by thoſe, who dwell in '*Á'ryáverta*, or the land of the venerable.

35. 'Thoſe three of a baſe tribe are ſeverally 'begotten on *Á'yógaví* women, who wear the 'clothes of the deceaſed and eat reprehenſible 'food.

36. 'From a *Niſháda* ſprings *by a woman of* 'the Vaidéha *tribe*, a *Cárávara*, who cuts lea- 'ther, and from a *Vaidéha* ſpring *by women of* 'the Cárávara *and* Niſháda *caſts*, an *Andhra* 'and a *Méda*, who muſt live without the town.

37. 'From a *Chandála*, by a *Vaidéhì* woman, 'comes a *Pánduſópáca*, who works with cane

'and reeds; and from a *Niſhâda*, an *Ahindica*,
'who acts as a jailor.

38. 'From a *Chandâla*, by a *Puccasì* woman,
'is born a *Sópâca*, who lives by puniſhing crimi-
'nals condemned by the king, a ſinful wretch
'ever deſpiſed by the virtuous.

39. 'A *Niſhâdì* woman, by a *Chandâla*, pro-
'duces a ſon called *Antyavaſayin*, employed in
'places for burning the dead, contemned even
'by the contemptible.

40. 'Theſe, among various mixed claſſes,
'have been deſcribed by their ſeveral fathers
'and mothers; and, whether concealed or open,
'they may be known by their occupations.

41. 'Six ſons, *three* begotten on women of
'the ſame claſs, and *three* on women of lower
'claſſes, muſt perform the duties of twiceborn
'men; but thoſe, who are *born in an inverſe*
'*order*, *and* called lowborn, are equal, in reſpect
'of duty, to mere *Súdras*.

42. 'By the force of extreme devotion and
'of exalted fathers, all of them may riſe *in time*
'to high birth, as *by the reverſe* they may ſink
'to a lower ſtate, in every age among mortals
'in this inferiour world.

43. 'THE following races of *Cſhatríyas*, by
'their omiſſion of holy rites and by ſeeing no
'*Brâhmens*, have gradually ſunk among men to
'the loweſt of the four claſſes:

44. 'Paund'racas, Odras, and Draviras; 'Cámbójas, Yavanas, and Sacas; Páradas, 'Pahlavas, Chínas, Cirátas, Deradas, and 'C'haſas.

45. 'All thoſe tribes of men, who ſprang 'from the mouth, the arm, the thigh, and the 'foot of BRAHMA', *but* who became outcaſts *by* '*having neglected their duties*, are called *Daſyus*, 'or *plunderers*, whether they ſpeak the language 'of *Mlèchch'has*, or that of *A'ryas*.

46. 'THOSE ſons of the twiceborn, who are 'ſaid to be degraded, and who are conſidered as 'lowborn, ſhall ſubſiſt only by ſuch employ-'ments, as the twiceborn deſpiſe.

47. '*Sútas* muſt live by managing horſes and 'by driving cars; *Ambaſht'has*, by curing diſ-'orders; *Vaidèhas*, by waiting on women; *Má-'gadhas*, by travelling with merchandize;

48. '*Niſhádas*, by catching fiſh; an *A'yógava*, 'by the work of a carpenter; a *Méda*, an *An-'dhra*, and (the ſons of a *Bráhmen* by wives of 'the *Vaidèha* and *Ugra* claſſes, reſpectively called) 'a *Chunchu* and a *Madgu*, by ſlaying beaſts of 'the foreſt;

49. 'A *Cſhattrĭ*, an *Ugra*, and a *Puccaſa*, 'by killing or confining ſuch animals as live in 'holes: *Dhigvanas*, by ſelling leather; *Vénas*, 'by ſtriking muſical inſtruments:

50. 'Near large publick trees, in places for 'burning the dead, on mountains, and in 'groves, let thoſe tribes dwell, generally known, 'and engaged in their ſeveral works.

51. 'THE abode of a *Chandála* and a *Swa-'páca* muſt be out of the town; they muſt not 'have the uſe of entire veſſels; their ſole wealth 'muſt be dogs and aſſes:

52. 'Their clothes muſt be the mantles of 'the deceaſed; their diſhes for food, broken 'pots; their ornaments, ruſty iron; continually 'muſt they roam from place to place:

53. 'Let no man, who regards his duty re-'ligious and civil, hold any intercourſe with 'them; let their tranſactions be confined to 'themſelves, and their marriages only between 'equals:

54. 'Let food be given to them in pot-'ſherds, but not by the hands of the giver; 'and let them not walk by night in cities or 'towns:

55. 'By day they may walk about for the 'purpoſe of work, diſtinguiſhed by the king's 'badges; and they ſhall carry out the corpſe of 'every one, who dies without kindred: ſuch 'is the fixed rule.

56. 'They ſhall always kill thoſe, who are 'to be ſlain by the ſentence of the law, and by 'the royal warrant; and let them take the

'clothes of the ſlain, their beds, and their or-
'naments.

57. 'HIM, who was born of a ſinful mother,
'*and conſequently* in a low claſs, but is not
'openly known, who, though worthleſs in
'truth, bears the ſemblance of a worthy man, let
'people diſcover by his acts:

58. 'Want of virtuous dignity, harſhneſs of
'ſpeech, cruelty, and habitual neglect of pre-
'ſcribed duties, betray in this world the ſon of
'a criminal mother.

59. 'Whether a man of debaſed birth aſſume
'the character of his father or of his mother,
'he can at no time conceal his origin:

60. 'He, whoſe family had been exalted,
'but whoſe parents were criminal in marrying,
'has a baſe nature, according as the offence *of*
'*his mother* was great or ſmall.

61. 'In whatever country ſuch men are
'born, as deſtroy the purity of the four claſſes,
'that country ſoon periſhes together with the na-
'tives of it.

62. 'Deſertion of life, without reward, for
'the ſake of preſerving a prieſt or a cow, a wo-
'man or a child, may cauſe the beatitude of
'thoſe baſeborn tribes.

63. Avoiding all injury *to animated beings*,
'veracity, abſtinence from theft, *and from unjuſt*
'*ſeizure of property*, cleanlineſs, and command

'over the bodily organs, form the compendious 'ſyſtem of duty, which MENU has ordained for 'the four claſſes.

64. 'SHOULD the tribe ſprung from a *Bráh-* 'men, by a *Súdra* woman, produce *a ſucceſſion of* 'children by the marriages of its women with 'other *Bráhmens*, the low tribe ſhall be raiſed 'to the higheſt in the ſeventh generation.

65. 'As the ſon of a *Súdra* may *thus* attain 'the rank of a *Bráhmen*, and as the ſon of a 'Bráhmen may ſink to a level with *Súdras*, even 'ſo muſt it be with him, who ſprings from a 'Cſhatriya; even ſo with him, who was born 'of a *Vaiſya*,

66. 'IF there be a doubt, as to the preference 'between him, who was begotten by a *Bráhmen* 'for his pleaſure, *but not in wedlock*, on a *Súdra* 'woman, and him, who was begotten by a 'Súdra on a *Bráhmení*,

67. 'Thus is it removed: he, who was be- 'gotten by an exalted man on a baſe woman, 'may by his good acts become reſpectable; but 'he, who was begotten on an exalted woman 'by a baſe man, muſt himſelf continue baſe:

68. 'Neither of the two (as the law is fixed) 'ſhall be girt with a ſacred ſtring; not the for- 'mer, becauſe his mother was low; nor the 'ſecond, becauſe the order of the claſſes was in- 'verted.

69. 'As good grain, ſpringing from good 'ſoil, is in all reſpects excellent, thus a man, 'ſpringing from a reſpectable father by a reſpect-'able mother, has a claim to the whole inſtitu-'tion of the twice born.

70. 'Some ſages give a preference to the 'grain; others to the field; and others conſider 'both field and grain; on this point the deciſion 'follows:

71. 'Grain, caſt into bad ground, wholly 'periſhes, and a good field with no grain ſown 'in it, is a mere heap of clods;

72. 'But ſince, by the virtue of eminent fa-'thers, even the ſons of wild animals, *as* Riſh-'yaſringa, *and others*, have been transformed 'into holy men revered and extolled, the pa-'ternal ſide, therefore, prevails.

73. 'BRAHMA' himſelf, having compared a '*Súdra*, who performs the duties of the twice-'born, with a twiceborn man, who does the 'acts of a *Súdra*, ſaid: "Thoſe two are neither "equal nor unequal," *that is, they are neither 'equal in rank, nor unequal in bad conduct.*

74. 'LET ſuch *Bráhmens* as are intent on the 'means of attaining the ſupreme godhead, and 'firm in their own duties, completely perform 'in order, the ſix following acts:

75. 'Reading the *Védas*, and teaching *others* 'to read them, ſacrificing, and aſſiſting *others* to

'ſacrifice, giving *to the poor, if themſelves have* 'enough, and accepting *gifts from the virtuous, if* 'themſelves are poor, are the ſix preſcribed acts 'of the firſtborn claſs;

76. 'But, among thoſe ſix acts of a *Bráhmen*, 'three are his *means of* ſubſiſtence; aſſiſting to 'ſacrifice, teaching the *Veaas*, and receiving 'gifts from a purehanded giver.

77. 'Three acts of duty ceaſe with the *Bráh-* 'men, and belong not to the *Cſhatriya*; teaching 'the *Védas*, officiating at a ſacrifice, and, thirdly, 'receiving preſents;

78. 'Thoſe *three* are alſo (by the fixed rule 'of law) forbidden to the *Vaiſya;* ſince MENU, 'the lord of all men, preſcribed not thoſe acts to 'the two *claſſes, military and commercial.*

79. 'The means of ſubſiſtence, peculiar to 'the *Cſhatriya*, are bearing arms, either held for 'ſtriking or miſſile; to the *Vaiſya*, merchandize, 'attending on cattle, and agriculture: but *with* 'a *view to the next life* the duties of both are 'almſgiving, reading, ſacrificing.

80. 'Among the ſeveral occupations *for gain-* 'ing a livelihood the moſt commendable reſpect- 'ively for the ſacerdotal, military, and mercan- 'tile claſſes, are teaching the *Véda*, defending 'the people, and commerce or keeping herds 'and flocks.

81. 'Yet a *Bráhmen*, unable to ſubſiſt by his

'duties juſt mentioned, may live by the duty of 'a ſoldier; for that is the next in rank.

82. 'If it be aſked, how he muſt live, ſhould 'he be unable to get a ſuſiſtence by either of 'thoſe employments; *the anſwer is*, he may 'ſubſiſt as a mercantile man, applying himſelf 'in *perſon* to tillage and attendance on cattle:

83. 'But a *Bráhmen* and a *Cſhatriya*, obliged 'to ſubſiſt by the acts of a *Vaiſya*, muſt avoid 'with care, *if they can live by keeping herds*, the 'buſineſs of tillage, which gives great pain *to* 'ſentient *creatures*, and is dependant on *the la-* 'bour *of* others, *as bulls and ſo forth.*

84. 'Some are of opinion, that agriculture is 'excellent; but it is a mode of ſubſiſtence, 'which the benevolent greatly blame; for the 'ironmouthed pieces of wood not only wound 'the earth, but the creatures dwelling in it.

85. 'If, through want of a virtuous live- 'lihood, they cannot follow laudable occupa- 'tions, they may then gain a competence of 'wealth by ſelling commodities uſually ſold 'by merchants, avoiding what ought to be 'avoided:

86. 'They muſt avoid ſelling liquids of all 'ſorts, dreſſed grain, ſeeds of *tila*, ſtones, ſalt, 'cattle and human creatures;

87. 'All woven cloth dyed red, cloth made 'of *ſana*, of *cſhumá* bark, and of wool, even

'though not red; fruit, roots, and medicinal 'plants;

88. 'Water, iron, poiſon, fleſhmeat, the 'moonplant, and perfumes of any ſort; milk, 'honey, buttermilk, clarified butter, oil of *tila*, 'wax, ſugar, and blades of *cuſa*-graſs;

89. 'All beaſts of the foreſt, *as deer and the* '*like;* ravenous beaſts, birds, *and fiſh*; ſpi- 'rituous liquors, *níli*, or indigo, and *lácſhá*, 'or lac; and all beaſts with uncloven hoofs.

90. 'But the *Bráhmen* huſbandman may at 'pleaſure ſell pure *tila* ſeeds for the purpoſe of 'holy rites, if he keep them not long *with a hope* '*of more gain*, and ſhall have produced them 'by his own culture:

91. 'If he apply ſeeds of *tila* to any purpoſe 'but food, anointing, and ſacred oblations, he 'ſhall be plunged, in the ſhape of a worm, to- 'gether with his parents, into the ordure of dogs.

92. 'By ſelling fleſhmeat, *lácſhá*, or ſalt, a '*Bráhmen* immediately ſinks low; by ſelling 'milk three days, he falls to a level with a '*Súdra*;

93. 'And by ſelling the other forbidden 'commodities with his own free will, he aſſumes 'in this world, after ſeven nights, the nature of 'a mere *Vaiſya*.

94. 'Fluid things may, however, be bartered 'for other fluids, but not ſalt for any thing

'liquid; ſo may dreſſed grain for grain un-
'dreſſed, and *tila* ſeeds for grain in the huſk,
'equal weights or meaſures being given and
'taken.

95. 'A MILITARY man, in diſtreſs, may
'ſubſiſt by all theſe means, but at no time muſt
'he have recourſe to the higheſt, *or ſacerdotal*,
'function.

96. 'A man of the loweſt claſs, who,
'through covetouſneſs, lives by the acts of the
'higheſt, let the king ſtrip of all his wealth and
'inſtantly baniſh:

97. 'His own office, though defectively per-
'formed, is preferable to that of another,
'though performed completely; for he, who
'*without neceſſity* diſcharges the duties of an-
'other claſs, immediately forfeits his own.

98. 'A MERCANTILE man, unable to ſubſiſt
'by his own duties, may deſcend even to the
'ſervile acts of a *Súdra*, taking care never to do
'what ought never to be done; but, when he
'has gained a competence, let him depart from
'ſervice.

99. 'A MAN of the fourth claſs, not finding
'employment by waiting on the twiceborn,
'while his wife and ſon are tormented with
'hunger, may ſubſiſt by handicrafts:

100. 'Let him principally follow thoſe me-
'chanical occupations, *as joinery and maſonry*, or

'thoſe various practical arts, *as painting and* '*writing*, by following which, he may ſerve the 'twiceborn.

101. 'SHOULD a *Bráhmen*, afflicted and pin-'ing through want of food, chooſe rather to re-'main fixed in the path of his own duty, than 'to adopt the practice of *Vaiſyas*, let him act in 'this manner:

102. 'The *Bráhmen*, having fallen into diſ-'treſs, may receive gifts from any perſon what-'ever; for by no ſacred rule can it be ſhown, 'that abſolute purity can be ſullied.

103. 'From interpreting the *Véda*, from offi-'ciating at ſacrifices, or from taking preſents, 'though in modes generally diſapproved, no ſin 'is committed by prieſts *in diſtreſs*; for they are 'pure as fire or water.

104. 'He, who receives food, when his life 'could not otherwiſe be ſuſtained, from any 'man whatever, is no more tainted by ſin, than 'the ſubtil ether by mud:

105. 'AJI'GARTA, dying with hunger, was 'going to deſtroy his own ſon (*named* S'UNAH-'S'E'P'HA) *by ſelling him for ſome cattle*; yet he 'was guilty of no crime, ſince he only ſought a 'remedy againſt famiſhing:

106. 'VA'MADE'VA, who well knew right 'and wrong, was by no means rendered impure, 'though deſirous, when oppreſſed *with hunger*,

'of eating the fleſh of dogs for the preſervation
'of his life:

107. 'BHARADWA'JA, eminent in devotion,
'when he and his ſon were almoſt ſtarved in a
'dreary foreſt, accepted ſeveral cows from the
'carpenter VRĬDHU:

108. 'VISWA'MITRA too, than whom none
'better knew the diſtinctions between virtue
'and vice, reſolved, when he was periſhing with
'hunger, to eat the haunch of a dog, which he
'had received from a *Chandála*.

109. 'Among *the* acts *generally diſapproved*,
'*namely*, accepting preſents *from low men*, aſſiſt-
'ing *them* to ſacrifice, and explaining the ſcripture
'*to them*, the receipt of preſents is the meaneſt
'*in this world*, and the moſt blamed in a *Bráh-*
'*men* after his preſent life;

110. 'Becauſe aſſiſting to ſacrifice and ex-
'plaining the ſcripture are two acts always per-
'formed for thoſe, whoſe minds have been im-
'proved *by the ſacred initiation*; but gifts are
'alſo received from a ſervile man of the loweſt
'claſs.

111. 'The guilt, incurred by aſſiſting *low*
'*men* to ſacrifice and by teaching *them* the
'ſcripture, is removed by repetitions of the
'*gáyatrì* and oblations to fire; but that, incurred
'by accepting gifts *from them*, is expiated only

'by abandoning the gifts and by rigorous devo-
'tion.

112. 'It were better for a *Bráhmen*, who
'could not maintain himſelf, to glean ears and
'grains after harveſt from *the field of* any perſon
'whatever: gleaning whole ears would be better
'than accepting a preſent, and picking up ſin-
'gle grains would be ſtill more laudable.

113. '*Bráhmens*, who keep houſe, and are in
'want of any metals *except gold and ſilver*, or of
'other articles *for good uſes*, may aſk the king
'for them, if he be of the military claſs; but a
'king, *known to be avaricious and* unwilling to
'give, muſt not be ſolicited.

114. 'The foremoſt, *in order*, of theſe things
'may be received more innocently than that,
'which follows it: a field untilled, a tilled field,
'cows, goats, ſheep, precious metals or gems,
'new grain, dreſſed grain.

115. 'THERE are ſeven virtuous means of
'acquiring property; ſucceſſion, occupancy or
'donation, and purchaſe or exchange, *which are*
'*allowed to all claſſes*; conqueſt, *which is peculiar*
'*to the military claſs*; lending at intereſt, huſ-
'bandry or commerce, *which belong to the mer-*
'*cantile claſs*; and acceptance of preſents, *by the*
'*ſacerdotal claſs*, from reſpectable men.

116. 'Learning, *except that contained in the*

'*ſcriptures*, art, *as mixing perfumes and the* '*like*, work for wages, menial ſervice, attend- 'ance on cattle, traffick, agriculture, content 'with little, alms, and receiving high intereſt 'on money, are ten modes of ſubſiſtence *in times* '*of diſtreſs*.

117. 'Neither a prieſt nor a military man, '*though diſtreſſed*, muſt receive intereſt on loans; 'but each of them, if he pleaſe, may pay *the* 'ſmall intereſt *permitted by law, on borrowing* 'for ſome pious uſe, to the ſinful man, *who de-* '*mands it*.

118. 'A MILITARY king, who takes even a 'fourth part *of the crops of his realm* at a time 'of urgent neceſſity, *as of war or invaſion*, and 'protects his people to the utmoſt of his power, 'commits no ſin:

119. 'His peculiar duty is conqueſt, and he 'muſt not recede from battle; ſo that, while he 'defends by his arms the merchant and huſ- 'bandman, he may levy the legal tax *as the* '*price of protection*.

120. 'The tax on the mercantile claſs, *which* '*in times of proſperity muſt be only a twelfth part* '*of their crops, and a fiftieth of their perſonal* '*profits*, may be an eighth of their crops *in a* '*time of diſtreſs, or a ſixth, which is the medium,* '*or even a fourth in gre- -verſity*; but 'a twentieth of ey, and

'other moveables, is the higheſt *tax:* ſerving 'men, artiſans, and mechanicks muſt aſſiſt by 'their labour, *but at no time pay taxes.*

121. 'IF a *Súdra* want a ſubſiſtence *and* 'cannot attend a prieſt, he may ſerve a *Cſha-* 'triya; or, *if he cannot wait on a ſoldier by birth,* 'he may gain his livelihood by ſerving an opu- 'lent *Vaiſya.*

122. 'To him, who ſerves *Bráhmens* with a 'view to a heavenly reward, or even with a 'view to both *this life and the next,* the union 'of the word *Bráhmen* with his *name of ſervant* 'will aſſuredly bring ſucceſs.

123. 'Attendance on *Bráhmens* is pro- 'nounced the beſt work of a *Súdra:* whatever 'elſe he may perform will comparatively avail 'him nothing.

124. 'They muſt allot him a fit mainte- 'nance according to their own circumſtances, 'after conſidering his ability, his exertions, and 'the number of thoſe, whom he muſt provide 'with nouriſhment:

125. 'What remains of their dreſſed rice 'muſt be given to him; and apparel which 'they have worn, and the refuſe of their grain, 'and their old houſehold furniture.

126. 'THERE is no guilt in a man of the 'ſervile claſs, *who eats leeks and other forbidden* 'vegetables: he muſt not have the ſacred inveſ-

'titure: he has no buſineſs with *the* duty *of* '*making oblations to fire and the like*; but there is 'no prohibition againſt *his offering dreſſed grain* '*as a ſacrifice, by way of diſcharging* his own 'duty.

127. 'Even *Súdras*, who are anxious to 'perform their entire duty, and, knowing what 'they ſhould perform, imitate the practice of 'good men *in the houſehold ſacraments*, but 'without any holy text, *except thoſe containing* '*praiſe and ſalutation*, are ſo far from ſinning, 'that they acquire juſt applauſe:

128. 'As a *Súdra*, without injuring another 'man, performs the *lawful* acts of the twice-'born, even thus, without being cenſured, he 'gains exaltation in this world and in the 'next.

129. 'No *ſuperfluous* collection of wealth 'muſt be made by a *Súdra*, even though he 'has power *to make it*, ſince a ſervile man, 'who has amaſſed riches, *becomes proud, and*, '*by his inſolence or neglect*, gives pain even to '*Brahmens*.

130. 'Such, as have been fully declared, 'are the ſeveral duties of the four claſſes in diſ-'treſs for ſubſiſtence; and, if they perform 'them exactly, they ſhall attain the higheſt 'beatitude.

131. 'Thus has been propounded the fy-
'ſtem of duties, religious and civil, ordained
'for all claſſes: I next will declare the pure law
'of expiation for ſin.'

CHAPTER THE ELEVENTH.

On Penance and Expiation.

1. 'HIM, who intends to marry for the 'ſake of having iſſue; him, who wiſhes to 'make a ſacrifice; him, who travels; him, who 'has given all his wealth at a ſacred rite; him, 'who deſires to maintain his preceptor, his 'father, or his mother; him, who needs a 'maintenance for himſelf, when he firſt reads the '*Védas*, and him, who is afflicted with illneſs;

2. 'Theſe nine *Bráhmens* let mankind con-'ſider as virtuous mendicants, called *ſnátacas*; 'and, to relieve their wants, let gifts *of cattle or* '*gold* be preſented to them in proportion to 'their learning:

3. 'To theſe moſt excellent *Bráhmens* muſt 'rice alſo be given with holy preſents *at obla-'tions to fire and within the conſecrated circle*; 'but the dreſſed rice, which others are to re-'ceive, muſt be delivered on the outſide of the 'ſacred hearth: *gold and the like may be given* '*any where.*

4. 'On ſuch *Bráhmens*, as well know the

'*Véda*, let the king beſtow, as it becomes him, 'jewels of all ſorts, and the ſolemn reward for 'officiating at the ſacrifice.

5. 'He, who has a wife, and, having beg-'ged money *to defray his nuptial expences*, mar-'ries another woman, ſhall have no advantage 'but ſenſual enjoyment: the offspring belongs 'to the beſtower of the gift.

6. 'Let every man, according to his ability, 'give wealth to *Bráhmens* detached from the 'world and learned in ſcripture: ſuch a giver 'ſhall attain heaven after this life.

7. 'He alone is worthy to drink the juice of 'the moonplant, who keeps a proviſion of 'grain ſufficient to ſupply thoſe, whom the law 'commands him to nouriſh, for the term of 'three years or more;

8. 'But a twiceborn man, who keeps a leſs 'proviſion of grain, yet preſumes to taſte the 'juice of the moonplant, ſhall gather no fruit 'from that ſacrament, even though he taſte it at 'the firſt, *or ſolemn, much leſs at any occaſional*, 'ceremony.

9. 'He, who beſtows gifts on ſtrangers *with* 'a *view to worldly fame*, while he ſuffers his fa-'mily to live in diſtreſs, though he has power 'to *ſupport them*, touches his lips with honey, 'but ſwallows poiſon; ſuch virtue is counter-'feit:

10. 'Even what he does for the ſake of his 'future ſpiritual body, to the injury of thoſe, 'whom he is bound to maintain, ſhall bring 'him ultimate miſery both in this life and in 'the next.

11. 'SHOULD a ſacrifice, performed by any 'twiceborn ſacrificer, and by a *Bráhmen* eſpe-'cially, be imperfect from the want of ſome in-'gredient, during the reign of a prince, who 'knows the law,

12. 'Let him take that article, for the com-'pletion of the ſacrifice, from the houſe of any '*Vaiſya*, who poſſeſſes conſiderable herds, but 'neither ſacrifices, nor drinks the juice of the 'moonplant:

13. 'If ſuch a *Vaiſya* be not near, he may 'take two or three ſuch neceſſary articles at 'pleaſure from the houſe of a *Súdra*; ſince a '*Súdra* has no buſineſs with ſolemn rites.

14. 'Even from the houſe of a *Bráhmen* or 'a *Cſhatriya*, who poſſeſſes a hundred cows, 'but has no conſecrated fire, or a thouſand 'cows, but performs no ſacrifice *with the moon-'plant*, let a prieſt without ſcruple take *the 'articles wanted.*

15. 'From another *Bráhmen*, who continu-'ally receives preſents but never gives, let him 'take ſuch ingredients of the ſacrifice, if not

'beſtowed *on requeſt:* ſo ſhall his fame be ſpread 'abroad, and his habits of virtue increaſe.

16. 'Thus, likewiſe, may a *Bráhmen*, who 'has not eaten at the time of ſix meals, *or has* '*faſted three whole days*, take at the time of the 'ſeventh meal, *or on the fourth morning*, from 'the man, who behaves baſely *by not offering* '*him food*, enough to ſupply him till the mor-'row:

17. 'He may take it from the floor, where 'the grain is trodden out of the huſk, or from 'the field, or from the houſe, or from any 'place whatever; but, if the owner aſk *why he* '*takes it*, the cauſe of the taking muſt be de-'clared.

18. 'The wealth of a virtuous *Bráhmen* 'muſt at no time be ſeized by a *Cſhatriya*; 'but, having no other means *to complete a ſacri-*'*fice*, he may take the goods of any man, who 'acts wickedly, and of any, who performs not 'his religious duties:

19. 'He, who takes property from the bad '*for the purpoſe before-mentioned*, and beſtows it 'on the good, transforms himſelf into a boat, 'and carries both *the good and the bad* over *a ſea* '*of calamities.*

20. 'Wealth, poſſeſſed by men for the per-'formance of ſacrifices, the wiſe call the pro-

'perty of the gods; but the wealth of men,
'who perform no ſacrifice, they conſider as the
'property of demons.

21. 'Let no pious king fine the man, *who*
'*takes by ſtealth or by force what he wants to*
'*make a ſacrifice perfect*; ſince it is the king's
'folly, that cauſes the hunger or wants of a
'*Bráhmen:*

22. 'Having reckoned up the perſons, whom
'the *Bráhmen* is obliged to ſupport, having aſ-
'certained his divine knowledge and moral
'conduct, let the king allow him a ſuitable
'maintenance from his own houſehold;

23. 'And, having appointed him a mainte-
'nance, let the king protect him on all ſides;
'for he gains from the *Bráhmen*, whom he pro-
'tects, a ſixth part of *the reward for* his virtue.

24. 'LET no *Bráhmen* ever beg a gift from
'a *Súdra*; for, if he perform a ſacrifice after
'ſuch begging, he ſhall, in the next life, be
'born a *Chandála*.

25. 'The *Bráhmen*, who begs any articles
'for a ſacrifice, and diſpoſes not of them all for
'that purpoſe, ſhall become a kite or a crow
'for a hundred years.

26. 'Any evilhearted wretch, who, through
'covetouſneſs, ſhall ſeize the property of the
'gods or of *Bráhmens*, ſhall feed in another
'world on the orts of vultures,

27. 'THE ſacrifice *Vaiſwánarí* muſt be conſtantly performed on the firſt day of the new year, or on the new moon of *Chaitra*, as an expiation for having omitted *through mere forgetfulneſs* the appointed ſacrifices of cattle and the rites of the moonplant:

28. 'But a twiceborn man, who, without neceſſity, does an act allowed only in a caſe of neceſſity, reaps no fruit from it hereafter; thus has it been decided.

29. 'By the *Viſwédévas*, by the *Sádhyas*, and by eminent *Ríſhis* of the ſacerdotal claſs, the ſubſtitute was adopted for the principal act, when they were apprehenſive of dying in times of eminent peril;

30. 'But no reward is prepared in a future ſtate for that illminded man, who, when able to perform the principal ſacrifice, has recourſe to the ſubſtitute.

31. 'A PRIEST, who well knows the law, needs not complain to the king of any grievous injury; ſince, even by his own power, he may chaſtiſe thoſe, who injure him:

32. 'His own power, *which depends on himſelf alone*, is mightier than the royal power, *which depends on other men:* by his own might, therefore, may a *Bráhmen* coerce his foes.

33. 'He may uſe, without heſitation, the powerful charms revealed to AT'HARVAN, and

'*by him* to ANGIRAS; for ſpeech is the weapon
'of a *Bráhmen:* with that he may deſtroy his
'oppreſſors.

34. 'A ſoldier may avert danger from him-
'ſelf by the ſtrength of his arm; a merchant
'and a mechanick, by their property; but the
'chief of the twiceborn, by holy texts and ob-
'lations to fire.

35. 'A prieſt, who performs his duties, who
'juſtly corrects *his children and pupils*, who ad-
'viſes expiations for ſin, and who loves all ani-
'mated creatures, is truly called a *Bráhmen:* to
'him let no man ſay any thing unpropitious,
'nor uſe any offenſive language.

36. 'Let not a girl, nor a young woman
'*married or unmarried*, nor a man with little
'learning, nor a dunce, perform an oblation to
'fire; nor a man diſeaſed, nor one uninveſted
'*with the ſacrificial ſtring*;

37. 'Since any of thoſe perſons, who make
'ſuch an oblation, ſhall fall into a region of
'torture, together with him, who ſuffers his
'hearth to be uſed: he alone, who perfectly
'knows the ſacred ordinances, and has read all
'the *Védas*, muſt officiate at an oblation to holy
'fire.

38. 'A *Bráhmen* with abundant wealth, who
'preſents not the prieſt, that hallows his fire,
'with a horſe conſecrated to PRAJA'PATI,

'becomes equal to one who has no fire hal-
'lowed.

39. 'Let him, who believes the ſcripture,
'and keeps his organs in ſubjection, perform
'all other pious acts; but never in this world
'let him offer a ſacrifice with trifling gifts to
'the officiating prieſt:

40. 'The organs of ſenſe and action, repu-
'tation *in this life*, a heavenly manſion *in the*
'*next*, life *itſelf*, a great name *after death*, chil-
'dren, *and* cattle, are all deſtroyed by a ſacri-
'fice offered with trifling preſents: let no man,
'therefore, ſacrifice without liberal gifts.

41. 'THE prieſt, who keeps a ſacred hearth,
'but voluntarily neglects *the morning and even-*
'*ing oblations to* his fires, muſt perform, *in the*
'*manner to be deſcribed*, the penance *chándráyana*
'for one month; ſince that *neglect* is equally
'ſinful with the ſlaughter of a ſon.

42. 'They, who receive property from a
'*Súdra* for the performance of rites to conſe-
'crated fire, are contemned as miniſters of the
'baſe, by all ſuch as pronounce texts of the
'*Véda:*

43. 'Of thoſe ignorant prieſts, who ſerve
'the holy fire for the wealth of a *Súdra*, the
'giver ſhall always tread on the foreheads, and
'thus paſs over miſeries *in the gloom of death.*

44. 'EVERY man, who does not an act pre-

'ſcribed, or does an act forbidden, or is guilty
'of exceſs *even* in *legal* gratifications of the
'ſenſes, muſt perform an expiatory penance.

45. 'Some of the learned conſider an expia-
'tion as confined to involuntary ſin; but others,
'from the evidence of the *Vèda*, hold it effec-
'tual even in the caſe of a voluntary offence:

46. 'A ſin, involuntarily committed, is re-
'moved by repeating certain texts of the ſcrip-
'ture; but a ſin committed intentionally,
'through ſtrange infatuation, by harſh penances
'of different ſorts.

47. 'If a twiceborn man, by the will of
'God in this world, or from his natural birth,
'have any corporeal mark of an expiable ſin
'committed in this or a former ſtate, he muſt
'hold no intercourſe with the virtuous, while
'his penance remains unperformed.

48. 'Some evilminded perſons, for ſins com-
'mitted in this life, and ſome for bad actions
'in a preceding ſtate, ſuffer a morbid change
'in their bodies:

49. 'A ſtealer of gold from a *Bráhmen* has
'whitlows on his nails; a drinker of ſpirits,
'black teeth; the ſlayer of a *Bráhmen*, a ma-
'raſmus; the violator of his *guru's* bed, a de-
'formity in the generative organs;

50. 'A malignant informer, fetid ulcers in
'his noſtrils; a falſe detractor, ſtinking breath;

'a ſtealer of grain, the defect of ſome limb; a 'mixer *of bad wares with good*, ſome redundant 'member;

51. 'A ſtealer of dreſſed grain, dyſpepſia; 'a ſtealer of holy words, *or an unauthorized 'reader of the ſcriptures*, dumbneſs; a ſtealer 'of clothes, leproſy; a horſeſtealer, lameneſs;

52. 'The ſtealer of a lamp, total blindneſs; 'the miſchievous extinguiſher of it, blindneſs 'in one eye; a delighter in hurting ſentient 'creatures, perpetual illneſs; an adulterer, 'windy ſwelling in his limbs:

53. 'Thus, according to the diverſity of ac- 'tions, are born men deſpiſed by the good, ſtupid, 'dumb, blind, deaf, and deformed.

54. 'Penance, therefore, muſt invariably be 'performed for the ſake of expiation; ſince 'they, who have not expiated their ſins, will 'again ſpring to birth with diſgraceful marks.

55. 'KILLING a *Brâhmen*, drinking for- 'bidden liquor, ſtealing gold from a prieſt, 'adultery with the wife of a father, natural or 'ſpiritual, and aſſociating with ſuch as commit 'thoſe offences, wiſe legiſlators muſt declare to 'be crimes in the higheſt degree, *in reſpect of 'thoſe after mentioned, but leſs than inceſt in a 'direct line, and ſome others.*

56. 'FALSE boaſting of a high tribe, malig- 'nant information, before the king, of a crimi-

' nal *who muſt ſuffer death*, and falſely accuſing a ' ſpiritual preceptor, are crimes *in the ſecond de-* ' *gree, and* nearly equal to killing a *Bráhmen*.

57. ' Forgetting the texts of ſcripture, ſhow- ' ing contempt of the *Véda*, giving falſe evi- ' dence *without a bad motive*, killing a friend ' *without malice*, eating things prohibited, or, ' *from their manifeſt impurity*, unfit to be taſted, ' are ſix crimes nearly equal to drinking ſpirits; ' *but perjury and homicide require in atrocious caſes* ' *the harſheſt expiation*.

58. ' To appropriate a thing depoſited *or* ' *lent for a time*, a human creature, a horſe, ' precious metals, a field, a diamond, or any ' other gem, is nearly equal to ſtealing the gold ' of a *Bráhmen*.

59. ' Carnal commerce with ſiſters by the ' ſame mother, with little girls, with women ' of the loweſt mixed claſs, or with the wives ' of a friend or of a ſon, the wife muſt conſider ' as nearly equal to a violation of the paternal ' bed.

60. ' SLAYING a bull or cow, ſacrificing ' what ought not to be ſacrificed, adultery, ſell- ' ing oneſelf, deſerting a preceptor, a mother, ' a father, or a ſon, omitting to read the ſcrip- ' ture, and neglect of the fires *preſcribed by the* ' Dhermaſáſtra *only*,

61. ' The marriage of a younger brother be-

'fore the elder, and that elder's omiſſion to 'marry before the younger, giving a daughter 'to either of them, and officiating at their 'nuptial ſacrifice,

62. 'Defiling a damſel, uſury, want of per-'fect chaſtity in a ſtudent, ſelling a holy pool 'or garden, a wife, or a child,

63. 'Omitting the ſacred inveſtiture, aban-'doning a kinſman, teaching the *Véda* for hire, 'learning it from a hired teacher, ſelling com-'modities, that ought not to be ſold,

64. 'Working in mines of any ſort, engaging 'in *dykes, bridges, or other* great mechanical 'works, ſpoiling medicinal plants *repeatedly*, 'ſubſiſting by *the harlotry of* a wife, offering 'ſacrifices and preparing charms to deſtroy *the* 'innocent,

65. 'Cutting down green trees for firewood, 'performing holy rites with a ſelfiſh view 'merely, and eating prohibited food *once with-'out a previous deſign*,

66. 'Neglecting to keep up the conſecrated 'fire, ſtealing *any valuable thing beſides gold*, 'nonpayment of *the three* debts, application to 'the books of a falſe religion, and exceſſive at-'tention to muſick or dancing,

67. 'Stealing grain, baſe metals, or cattle, 'familiarity *by the twiceborn* with women, who 'have drunk inebriating liquor, killing *without*

'*malice*, a woman, *a Súdra*, *a Vaiſya*, or a *Cſha-*
'*triya*, and denying a future ſtate of rewards
'and puniſhments, are all crimes in the third
'degree, *but higher or lower according to circum-*
'*ſtances*.

68. 'GIVING pain to a *Bráhmen*, ſmelling at
'any ſpirituous liquor or any thing *extremely*
'*fetid and* unfit to be ſmelt, cheating, and un-
'natural practices with a male, are conſidered
'as cauſing a loſs of claſs.

69. 'To kill an aſs, a horſe, a camel, a deer,
'an elephant, a goat, a ſheep, a fiſh, a ſnake, or
'a buffalo, is declared an offence, which de-
'grades the killer to a mixed tribe.

70. 'ACCEPTING preſents from deſpicable
'men, illegal traffick, attendance on a *Súdra*
'maſter, and ſpeaking falſehood, muſt be con-
'ſidered as cauſes of excluſion from ſocial re-
'paſts.

71. 'KILLING an inſect, ſmall or large, a
'worm, or a bird, eating what has been brought
'*in the ſame baſket* with ſpirituous liquor, ſteal-
'ing fruit, wood, or flowers, and great pertur-
'bation of mind on trifling occaſions, are of-
'fences which cauſe defilement.

72. 'You ſhall now be completely inſtruct-
'ed in thoſe penances, by which all the ſins
'juſt mentioned are expiable.

73. 'IF a *Bráhmen* have killed a man of the

83. 'Or, *if a virtuous* Bráhmen *unintentionally kill another, who had no good quality*, he 'may atone for his guilt by proclaiming it in 'an aſſembly of prieſts and military men, at 'the ſacrifice of a horſe, and by bathing with 'other *Bráhmens* at the cloſe of the ſacrifice:

84. '*Bráhmens* are declared to be the baſis, 'and *Cſhatriyas* the ſummit, of the legal ſyſtem: 'he, therefore, expiates his offence by fully 'proclaiming it in ſuch an aſſembly.

85. 'From his high birth alone, a *Bráhmen* 'is an object of veneration even to deities: his 'declarations to mankind are deciſive evidence; 'and the *Véda* itſelf confers on him that cha-'racter.

86. 'Three at leaſt, who are learned in the '*Véda*, ſhould be aſſembled to declare the proper 'expiation for the ſin *of a prieſt, but, for the 'three other claſſes, the number muſt be doubled, 'tripled, and quadrupled:* what they declare 'ſhall be an atonement for ſinners; ſince the 'words of the learned give purity.

87. 'Thus a *Bráhmen*, who has performed 'one of the preceding expiations, *according to 'the circumſtances of the homicide and the cha-'racters of the perſons killed and killing*, with his 'whole mind fixed on GOD, purifies his ſoul, 'and removes the guilt of ſlaying a man of his 'own claſs:

88. 'He muſt perform the ſame penance 'for killing an embryo, *the ſex of which was* 'unknown, but whoſe parents were *ſacerdotal*, 'or a military or a commercial man employed 'in a ſacrifice, or a *Bráhmení* woman, who has 'bathed after temporary uncleanneſs;

89. 'And *the ſame* for giving falſe evidence '*in a cauſe concerning land or gold or precious* '*commodities*, and for accuſing his preceptor un-'juſtly, and for appropriating a depoſit, and 'for killing the wife of a prieſt, *who keeps a* '*conſecrated fire*, or for ſlaying a friend.

90. 'Such is the atonement ordained for 'killing a prieſt *without malice*; but for killing 'a *Bráhmen* with malice prepenſe, this is no 'expiation: *the term of twelve years muſt be* '*doubled, or, if the caſe was atrocious, the mur-*'*derer muſt actually die in flames or in battle.*

91. 'ANY twiceborn man, who has *inten-*'*tionally* drunk ſpirit of rice, through perverſe 'deluſion of mind, may drink more ſpirit in 'flame, and atone for his offence by ſeverely 'burning his body;

92. 'Or he may drink boiling hot, until he 'die, the urine of a cow, or pure water, or 'milk, or clarified butter, or juice expreſſed 'from cowdung:

93. 'Or, *if he taſted it unknowingly*, he may 'expiate the ſin of drinking ſpirituous liquor,

'by eating only ſome broken rice or grains of 'tila, from which oil has been extracted, once' 'every night for a whole year, wrapped in 'coarſe veſture of hairs from a cow's tail, *or* 'ſitting unclothed in his houſe, wearing his locks 'and beard uncut, and putting out the flag of 'a tavern-keeper.

94. 'Since the ſpirit of rice is *diſtilled from* 'the Mala, *or* filthy refuſe, of the grain, and 'ſince *Mala* is alſo a name for ſin, let no *Bráh-* 'men, *Cſhatriya*, or *Vaiſya* drink that ſpirit.

95. 'Inebriating liquor may be conſidered 'as of three *principal* ſorts; that extracted from 'dregs of ſugar, that extracted from bruiſed 'rice, and that extracted from the flowers of 'the *Madhúca:* as one, ſo *are* all; they ſhall 'not be taſted by the chief of the twiceborn.

96. 'Thoſe liquors, and *eight* other ſorts, 'with the fleſh of animals, and *A'ſava*, the 'moſt pernicious beverage, *prepared with nar-* 'cotick drugs, are ſwallowed at the juncates of 'Yacſhas, Racſhaſas, and Piſáchas: they ſhall 'not, therefore, be taſted by a *Bráhmen*, who 'feeds on clarified butter offered to gods.

97. 'A *Bráhmen*, ſtupefied by drunkenneſs, 'might fall on ſomething very impure, or might 'even, when intoxicated, pronounce a ſecret 'phraſe of the *Véda*, or might do ſome other 'act, which ought not to be done.

98. 'When the divine ſpirit, *or the light of* 'holy knowledge, which has been infuſed into 'his body, has once been ſprinkled with any 'intoxicating liquor, even his prieſtly charac- 'ter leaves him, and he ſinks to the low degree 'of a *Súdra*.

99. 'Thus have been promulgated the va- 'rious modes of expiation for drinking ſpirits: 'I will next propound the atonement for ſteal- 'ing the gold of a prieſt *to the amount of a* ſu- 'verna.

100. 'He, who has purloined the gold of a 'Bráhmen, muſt haſten to the king, and pro- 'claim his offence; adding, "Inflict on me "the puniſhment due to my crime."

101. 'Then ſhall the king himſelf, taking 'from him an iron mace, *which the criminal muſt* 'bear on his ſhoulder, ſtrike him with it once; 'and by that ſtroke, *whether he die or be only* 'left as dead, the thief is releaſed from ſin: a 'Bráhmen by rigid penance alone *can expiate* 'that offence; another twiceborn man may alſo 'perform ſuch a penance at his election.

102. 'The twiceborn man, who deſires to 'remove by auſtere devotion the taint cauſed 'by ſtealing gold, muſt perform in a foreſt, co- 'vered with a mantle of rough bark, the pe- 'nance *before ordained* for him, who *without* 'malice prepenſe has killed a *Bráhmen*.

103. 'By theſe expiations may the twiceborn 'atone for the guilt of ſtealing gold from a 'prieſt; but the ſin of adultery with the wife 'of a father, *natural or ſpiritual*, they muſt ex- 'piate by the following penances.

104. 'HE, who *knowingly and actually* has 'defiled the wife of his father, *ſhe being of the 'ſame claſs*, muſt extend himſelf on a heated 'iron bed, loudly proclaiming his guilt; and, 'there embracing the red-hot iron image of a 'woman, he ſhall atone for his crime by death;

105. 'Or, having himſelf amputated his 'penis and ſcrotum, and holding them in his 'fingers, he may walk in a direct path toward 'the ſouthweſt, or the region of NIRRĬTI, un- 'til he fall dead on the ground:

106. 'Or, *if he had miſtaken her for another 'woman*, he may perform for a whole year, 'with intenſe application of mind, the penance '*prájápatya*, with part of a bed, *or a human 'bone*, in his hand, wrapped in veſture of coarſe 'bark, letting his hair and beard grow, and 'living in a deſerted foreſt:

107. 'Or, *if ſhe was of a lower claſs and a 'corrupt woman*, he may expiate the ſin of vio- 'lating the bed of his father, by continuing the 'penance *chándráyana* for three months, al- 'ways mortifying his body by eating only fo- 'reſt herbs, or wild grains boiled in water.

108. 'By the preceding penances may ſin-
'ners of the two higher degrees atone for their
'guilt; and the leſs offenders may expiate theirs
'by the following auſterities.

109. 'He, who has committed the ſmaller
'offence of killing a cow *without malice*, muſt
'drink for the firſt month barleycorns boiled
'ſoft in water; his head muſt be ſhaved en-
'tirely; and, covered with the hide *of the ſlain*
'*cow*, he muſt fix his abode on her late paſture
'ground:

110. 'He may eat a moderate quantity of
'*wild grains*, but without any factitious ſalt,
'for the next two months at the time of each
'fourth repaſt, *on the evening of every ſecond*
'*day*; regularly bathing in the urine of cows,
'and keeping his members under controul:

111. 'All day he muſt wait on the herd,
'and ſtand quaffing the duſt raiſed *by their*
'*hoofs*; at night, having ſervilely attended and
'ſtroked and ſaluted them, he muſt ſurround
'them with a fence, and ſit near *to guard*
'them:

112. 'Pure and free from paſſion, he muſt
'ſtand, while they ſtand; follow them, when
'they move together; and lie down by them,
'when they lie down:

113. 'Should a cow be ſick or terrified by

'tigers or thieves, or fall, or ſtick in mud, he 'muſt relieve her by all poſſible means:

114. 'In heat, in rain, or in cold, or while 'the blaſt furiouſly rages, let him not ſeek his 'own ſhelter, without firſt ſheltering the cows 'to the utmoſt of his power.

115. 'Neither in his own houſe, or field, or 'floor for treading out grain, nor in thoſe of 'any other perſon, let him ſay a word of a 'cow, who eats *corn or graſs*, or of a calf, who 'drinks *milk:*

116. 'By waiting on a herd, according to 'theſe rules, for three months, the ſlayer of a 'cow atones for his guilt;

117. '*But*, his penance being performed, 'he muſt give ten cows and a bull, or, his 'ſtock not being ſo large, muſt deliver all he 'poſſeſſes, to ſuch as beſt know the *Véda*.

118. 'THE preceding penances, or that called '*chándráyana*, muſt be performed for the abſo-'lution of all twiceborn men, who have com-'mitted ſins of the lower *or third* degree; ex-'cept thoſe, who have incurred the guilt of an '*avacírna*;

119. 'But he, who has become *Avacírní*, muſt 'ſacrifice *a black or* a oneeyed aſs, by way of a 'meatoffering to NIRRĬTI, *patroneſs of the ſouth-'weſt*, by night in a place where four ways meet:

120. 'Let him daily offer to her in fire the 'fat of that aſs, and, at the cloſe *of the ceremony*, 'let him offer clarified butter, with the holy 'text *Sem* and ſo forth, to PAVANA, to INDRA, 'to VRĬHASPATI, and to AGNI, *regents of* 'wind, clouds, a planet, and fire.

121. 'A voluntary effuſion, *naturally or* 'otherwiſe, of that which may produce a man 'by a twiceborn youth during the time of his 'ſtudentſhip *or before marriage*, has been pro- 'nounced *avacírna*, or a violation of the rule 'preſcribed *for the firſt order*, by ſages, who 'knew the whole ſyſtem of duty, and uttered 'the words of the *Véda*.

122. 'To the four *deities of purification*, 'MA'RUTA, INDRA, VRĬHASPATI, AGNI, 'goes all the divine light, which the *Véda* had 'imparted, from the ſtudent, who commits the 'foul ſin *avacírna*;

123. 'But, this crime having actually been 'committed, he muſt go begging to ſeven 'houſes, clothed only with the hide of the *ſa-* 'crificed aſs, and openly proclaiming his act:

124. 'Eating a ſingle meal begged from 'them, at the regular time of the day, *that is*, 'in the morning or evening, and bathing *each* 'day at the three *ſavanas*, he ſhall be abſolved 'from his guilt at the end of one year.

125. 'He, who has voluntarily committed 'any ſin, which cauſes a loſs of claſs, muſt per- 'form the *tormenting* penance, *thence* called '*ſántapana*; or the *prájápatya*, if he offended 'involuntarily.

126. 'For ſins, which degrade to a mixed 'claſs, or exclude from ſociety, the ſinner muſt 'have recourſe to the *lunar* expiation *chándráy-* 'ana for one month: to atone for acts, which 'occaſion defilement, he muſt ſwallow nothing 'for three days but hot barleygruel.

127. 'For killing *intentionally* a *virtuous* 'man of the military claſs, the penance muſt be 'a fourth part of that ordained for killing a 'prieſt; for killing a *Vaiſya*, only an eighth; 'for killing a *Súdra*, who had been conſtant in '*diſcharging* his duties, a ſixteenth part:

128. 'But, if a *Bráhmen* kill a *Cſhatriya* 'without malice, he muſt, after a full perform- 'ance of his religious rites, give the prieſts one 'bull together with a thouſand cows;

129. 'Or he may perform for three years 'the penance for ſlaying a *Bráhmen*, mortify- 'ing his organs of ſenſation and action, letting 'his hair grow long, and living remote from 'the town, with the root of a tree for his man- 'ſion.

130. 'If he kill *without malice* a *Vaiſya*, who

'had a good moral character, he may perform 'the ſame penance for one year, or give the 'prieſts a hundred cows and a bull:

131. 'For ſix months muſt he perform this 'whole penance, if *without intention* he kill a *Sú-'dra*; or he may give ten white cows and a 'bull to the prieſts.

132. 'If he kill *by deſign* a cat, or an ich-'neumon, the bird *Cháſha*, or a frog, a dog, a 'lizard, an owl, or a crow, he muſt perform 'the *ordinary* penance required for the death of 'a *Súdra*, that is, the *chándráyana:*

133. 'Or, *if he kill one of them undeſignedly*, 'he may drink nothing but milk for three *days 'and* nights, or *each night* walk a *yógan*, or 'thrice bathe in a river, or ſilently repeat the 'text on the divinity of water; *that is, if he be 'diſabled by real infirmity from performing the 'firſt mentioned penances, he may have recourſe to 'the next in order.*

134. 'A *Bráhmen*, if he kill a ſnake, muſt 'give *to ſome prieſt* a hoe, *or ironheaded ſtick*; if 'an eunuch, a load of riceſtraw, and a *máſha* of 'lead;

135. 'If a boar, a pot of clarified butter; if 'the bird *tittiri*, a *dróna* of *tila* ſeeds: if a par-'rot, a ſteer two years old; if the waterbird 'crauncha, a ſteer aged three years:

136. 'If he kill *a gooſe, or* a phenicopteros, a

'*heron, or* cormorant, a bittern, a peacock, an 'ape, a hawk, or a kite, he muſt give a cow to 'ſome *Bráhmen:*

137. 'If he kill a horſe, he muſt give a 'mantle; if an elephant, five black bulls; if a 'goat or a ſheep, one bull; if an aſs, a calf one 'year old:

138. 'If he kill a carnivorous wild beaſt, he 'muſt give a cow with abundance of milk; if a 'wild beaſt not carnivorous, a fine heifer; and 'a *racticá* of gold, if he ſlay a camel:

139. 'If he kill a woman *of any claſs* caught 'in adultery, he muſt give as an expiation, in 'the direct order of the four claſſes, a leathern 'pouch, a bow, a goat, and a ſheep.

140. 'Should a *Bráhmen* be unable to expi-'ate by gifts the ſin of killing a ſnake and the 'reſt, he muſt atone for his guilt by perform-'ing, on each occaſion, the penance *prájápatya.*

141. 'For the ſlaughter of a thouſand ſmall 'animals which have bones, or for that of 'boneleſs animals enow to fill a cart, he muſt 'perform the *chándráyana*, or common penance 'for killing a *Súdra*;

142. 'But, for killing boned animals, he 'muſt alſo give ſome trifle, *as a* pana *of copper,* 'to a *Bráhmen:* for killing thoſe without bones, 'he may be abſolved by holding his breath, *at* 'the cloſe of his penance, while he thrice repeats

'the *gâyatrì* with its *head*, the *pranava*, and the 'vyâhřitis.

143. 'For cutting *once without malice* trees 'yielding fruit, ſhrubs with many crowded 'ſtems, creeping or climbing plants, or ſuch as 'grow again when cut, if they were in bloſſom '*when he hurt them*, he muſt repeat a hundred 'texts of the *Véda*.

144. 'For killing inſects of any ſort bred in 'rice or other grains, or thoſe bred in honey *or* '*other* fluids, or thoſe bred in fruit or flowers, 'eating clarified butter is a full expiation.

145. 'If a man cut, *wantonly and* for no 'good purpoſe, ſuch graſſes as are cultivated, 'or ſuch as riſe in the foreſt ſpontaneouſly, he 'muſt wait on a cow for one day, nouriſhed by 'milk alone.

146. 'By theſe penances may mankind atone 'for the ſin of injuring ſentient creatures, whe-'ther committed by deſign or through inadvert-'ence: hear now what penances are ordained 'for eating or drinking what ought not to be 'taſted.

147. 'He, who drinks undeſignedly any ſpi-'rit *but that of rice*, may be abſolved by a new 'inveſtiture with the ſacrificial ſtring: even for 'drinking intentionally *the weaker ſorts of ſpirit*, 'a penance extending to death muſt not (as the 'law is now fixed) be preſcribed.

148. 'For drinking water which has ſtood 'in a veſſel, where ſpirit of rice or any other 'ſpirituous liquor had been kept, he muſt ſwal- 'low nothing, for five *days and* nights, but the 'plant *ſanc'hapuſhpí* boiled in milk:

149. 'If he touch any ſpirituous liquor, or 'give any away, or accept any in due form, *or* '*with thanks*, or drink water left by a *Súdra*, 'he muſt ſwallow nothing, for three *days and* 'nights, but *cuſ'a*-graſs boiled in water.

150. 'Should a *Bráhmen*, who has once taſt- 'ed the holy juice of the moonplant, even ſmell 'the breath of a man who has been drinking 'ſpirits, he muſt remove the taint by thrice re- 'peating the *gáyatrì*, while he ſuppreſſes his 'breath in water, and by eating clarified butter '*after that ceremony*.

151. 'If any of the three twiceborn claſſes 'have taſted unknowingly human ordure or 'urine, or any thing that has touched ſpirituous 'liquor, they muſt, *after a penance*, be girt 'anew with the ſacrificial thread;

152. 'But, in ſuch new inveſtiture of the 'twiceborn, the partial tonſure, the zone, the 'ſtaff, the petition of alms, and the ſtrict rules 'of abſtinence, need not be renewed.

153. 'Should one of them eat the food of 'thoſe perſons, with whom he ought never to 'eat, or food left by a woman or a *Súdra*, or

'any prohibited fleſh, he muſt drink barleygruel
'only for ſeven *days and* nights.

154. 'If a *Bráhmen* drink ſweet liquors
'turned acid, or aſtringent juices from impure
'fruits, he becomes unclean, as long as thoſe
'fluids remain undigeſted.

155. 'Any twiceborn man, who *by accident*
'has taſted the dung or urine of a tame boar,
'an aſs, a camel, a ſhakal, an ape or a crow,
'muſt perform the penance *chándráyana:*

156. 'If he taſte dried fleſhmeat, or muſh-
'rooms riſing from the ground, or any thing
'brought from a ſlaughter-houſe, though he
'knew not whence it came, he muſt perform
'the ſame penance.

157. 'For *knowingly* eating the fleſh of car-
'nivorous beaſts, of town-boars, of camels, of
'gallinaceous birds, of human creatures, of
'crows, or of aſſes, the penance *taptacrĭch'hra,*
'or *burning and ſevere,* is the only atonement.

158. 'A *Bráhmen,* who, before he has com-
'pleted his theological ſtudies, eats food at
'monthly obſequies *to one anceſtor,* muſt faſt
'three days *and nights,* and ſit in water a day:

159. 'But a ſtudent in theology, who at any
'time *unknowingly* taſtes honey or fleſh, muſt
'perform the loweſt penance, or the *prájápatya,*
'and proceed to finiſh his ſtudentſhip.

160. 'Having eaten what has been left by a

'cat, a crow, a mouſe, a dog, or an ichneumon,
'or what has even been touched by a louſe, he
'muſt drink, *boiled in water*, the plant *brah-*
'*muſuverchalá*.

161. 'By the man, who ſeeks purity of ſoul,
'no forbidden food muſt be taſted: what he has
'undeſignedly ſwallowed he muſt inſtantly
'vomit up, or muſt purify himſelf with ſpeed
'by legal expiations.

162. 'Such, as have been declared, are the
'various penances for eating prohibited food:
'hear now the law of penance for an expiation
'of theft.

163. 'THE chief of the twiceborn, having
'voluntarily ſtolen ſuch property, as grain, raw
'or dreſſed, from the houſe of another *Bráh-*
'*men*, ſhall be abſolved on performing the pe-
'nance *prájápatya* for a whole year;

164. 'But the penance *chándráyana* muſt be
'performed for ſtealing a man, woman, or
'child, for ſeizing a field, or a houſe, or for
'taking the waters of an encloſed pool or well.

165. 'Having taken goods of little value
'from the houſe of another man, he muſt pro-
'cure abſolution by performing the penance
'*ſántapana*; having firſt reſtored, *as the peni-*
'*tent thief always muſt*, the goods that he ſtole.

166. 'For taking what may be eaten, or
'what may be ſipped, a carriage, a bed, or a

'ſeat, roots, flowers, or fruit, an atonement 'may be made by ſwallowing the five pure 'things produced from a cow, *or milk, curds,* 'butter, *urine, dung:*

167. 'For ſtealing graſs, wood, or trees, rice 'in the huſk, molaſſes, cloth or leather, fiſh, or 'other animal food, a ſtrict faſt muſt be kept 'three *days and three* nights.

168. 'For ſtealing gems, pearls, coral, cop- 'per, ſilver, iron, braſs, or ſtone, nothing but 'broken rice muſt be ſwallowed for twelve 'days;

169. 'And nothing but milk for three days, 'if cotton, or ſilk, or wool had been ſtolen, or 'a beaſt either with cloven or uncloven hoofs, 'or a bird, or perfumes, or medicinal herbs, or 'cordage.

170. 'By theſe penances may a twiceborn 'man atone for the guilt of theft; but the fol- 'lowing auſterities only can remove the ſin of 'carnally approaching thoſe, who muſt not be 'carnally approached.

171. 'He, who has waſted his manly 'ſtrength with ſiſters by the ſame womb, with 'the wives of his friend or of his ſon, with girls 'under the age of puberty, or with women of 'the loweſt claſſes, muſt perform the penance 'ordained for defiling the bed of a preceptor:

172. 'He, who has carnally known the

'daughter of his paternal aunt, *who is almoſt* 'equal to a ſiſter, or the daughter of his mater-'nal aunt, or the daughter of his maternal 'uncle, *who is* a near kinſman, muſt perform the 'chándráyana, or *lunar penance*;

173. 'No man of ſenſe would take one of 'thoſe three as his wife: they ſhall not be taken 'in marriage by reaſon of their conſanguinity; 'and he, who marries any one of them, falls 'deep *into ſin.*

174. 'He, who has waſted, what might 'have produced a man, with female brute ani-'mals, with a woman during her courſes, or in 'any but the natural part, or in water, muſt 'perform the penance *ſántapana: for a beſtial* 'act with a cow the penance muſt be far more ſe-'vere.

175. 'A twiceborn man, dallying laſciviouſ-'ly with a male *in any place or at any time*, or 'with a female in a carriage drawn by bullocks, 'or in water, or by day, *ſhall be degraded, and* 'muſt bathe himſelf *publickly*, with his apparel.

176. 'Should a *Bráhmen* carnally know a 'woman of the *Chandála* or *Mléch'ha* tribes, or 'taſte their food, or accept a gift from them, 'he loſes his own claſs, *if he acted unknowingly*, 'or, *if knowingly*, ſinks to a level *with them.*

177. 'A wife, exceſſively corrupt, let her 'huſband confine to one apartment, and compel

'her to perform the penance ordained for a 'man, who has committed adultery:

178. 'If, having been ſolicited by a man of 'her own claſs, ſhe again be defiled, her expia- 'tion muſt be the penance *prájápatya* added to 'the *chándráyana.*

179. 'The guilt of a *Bráhmen*, who has dal- 'lied a whole night with a *Chandálí* woman, he 'may remove in three years by ſubſiſting on 'alms, and inceſſantly repeating the *gáyatrì* 'with other myſterious texts.

180. 'Theſe penances have been declared for 'ſinners of four ſorts, *thoſe who hurt ſentient 'creatures, thoſe who eat prohibited food, thoſe 'who commit theft, and thoſe who are guilty of 'laſciviouſneſs:* hear now the preſcribed expia- 'tion for ſuch, as hold any intercourſe with de- 'graded offenders.

181. 'He, who aſſociates himſelf for one 'year with a fallen ſinner, falls like him; not 'by ſacrificing, reading the *Véda*, or contracting 'affinity with him, *ſince by thoſe acts he loſes his 'claſs immediately*, but even by uſing the ſame 'carriage or ſeat, or by taking his food at the 'ſame board:

182. 'That man, who holds an intercourſe 'with any one of thoſe degraded offenders, 'muſt perform, as an atonement for ſuch inter-

'courſe, the penance ordained for that ſinner 'himſelf.

183. 'The *ſapindas* and *ſamánódacas* of a man 'degraded, *for a crime in the firſt degree*, muſt 'offer a libation of water to his manes, *as if he* '*were naturally dead*, out of the town, in the 'evening of ſome inauſpicious day, *as the ninth* '*of the moon*, his paternal kinſmen, his officiat-'ing prieſt, and his ſpiritual guide being preſent.

184. 'A female ſlave muſt kick down with 'her foot an old pot filled with water, *which* '*had for that purpoſe been placed towards the* '*ſouth*, as if it were an oblation for the dead; 'and all the kinſmen, in the nearer and remoter 'degrees, muſt remain impure for a day and a 'night:

185. 'They muſt thenceforth deſiſt from 'ſpeaking to him, from ſitting in his company, 'from delivering to him any inherited or other 'property, and from every civil or uſual atten-'tion, *as inviting him on the firſt day of the year*, '*and the like*.

186. 'His right of primogeniture, *if he was* '*an elder brother*, muſt be withholden from 'him, and whatever perquiſites ariſe from pri-'ority of birth: a younger brother excelling 'him in virtue, muſt appropriate the ſhare of 'the firſtborn.

187. 'But, when he has performed his due 'penance, his kinſmen and he muſt throw 'down a new veſſel full of water, after having 'bathed together in a pure pool:

188. 'Then muſt he caſt that veſſel into the 'water; and, having entered his houſe, he may 'perform, as before, all the acts incident to his 'relation by blood.

189. 'The ſame ceremony muſt be perform-'ed by the kindred even of women degraded, 'for whom clothes, dreſſed rice, and water muſt 'be provided; and they muſt dwell *in huts* near 'the family houſe.

190. 'With ſinners, whoſe expiations are 'unperformed, let not a man tranſact buſineſs 'of any kind; but thoſe, who have performed 'their expiations, let him at no time re-'proach:

191. Let him not, however, live with thoſe, 'who have ſlain children, or injured their bene-'factors, or killed ſuppliants for protection, or 'put women to death, even though ſuch offend-'ers have been legally purified.

192. 'THOSE men of the twiceborn claſſes, to 'whom the *gáyatrì* has not been repeated and 'explained, according to law, the aſſembly muſt 'cauſe to perform three *prájápatya* penances, 'and *afterwards* to be girt with the ſacrificial 'ſtring;

193. 'And the ſame penance they muſt pre-
'ſcribe to ſuch twiceborn men, as are anxious
'to atone for ſome illegal act, or a neglect of
'the *Véda*.

194. 'If prieſts have accepted any property
'from baſe hands, they may be abſolved by re-
'linquiſhing the preſents, by repeating myſteri-
'ous texts, and by acts of devotion:

195. 'By three thouſand repetitions of the
'*gáyatrì* with intenſe application of mind, and
'by ſubſiſting on milk only for a whole month
'in the paſture of cows, a *Bráhmen*, who has
'received any gift from a bad man, *or a bad*
'*gift from any man*, may be cleared from ſin.

196. 'When he has been mortified by abſti-
'nence, and has returned from the paſturage,
'let him bend low to the other *Bráhmens*, who
'muſt thus interrogate him: "Art thou really
"deſirous, good man, of readmiſſion to an
"equality with us?"

197. 'If he anſwer in the affirmative, let
'him give ſome graſs to the cows, and in the
'place, made pure by their having eaten on it,
'let the men of his claſs give their aſſent to his
'readmiſſion.

198. 'He, who has officiated at a ſacrifice
'for outcaſts, or burned the corpſe of a ſtranger,
'or performed rites to deſtroy the innocent, or
'made the impure ſacrifice, called *Abhna*, may

'expiate his guilt by three *prájápatya* pe-
'nances.

199. 'A TWICEBORN man, who has reject-
'ed a ſuppliant for his protection, or taught the
'*Véda* on a forbidden day, may atone for his
'offence by ſubſiſting a whole year on barley
'alone.

200. 'HE, who has been bitten by a dog, a
'ſhakal, or an aſs, by any carnivorous animal
'frequenting a town, by a man, a horſe, a
'camel, or a boar, may be purified by ſtop-
'ping his breath during one repetition of the
'*gáyatrì*.

201. 'To eat only at the time of the ſixth
'meal, *or on the evening of every third day*, for a
'month, to repeat a *Sanhità* of the *Védas*, and
'to make *eight* oblations to fire, accompanied
'with *eight* holy texts, are always an expiation
'for thoſe, who are excluded from ſociety at
'repaſts.

202. 'SHOULD a *Bráhmen* voluntarily aſcend
'a carriage borne by camels or drawn by aſſes, or
'deſignedly bathe quite naked, he may be ab-
'ſolved by one ſuppreſſion of breath, while he
'repeats in his mind the moſt holy text.

203. 'HE, who has made any excretion,
'being greatly preſſed, either without water
'*near him*, or in water, may be purified by

'bathing in his clothes out of town, and by 'touching a cow.

204. 'For an omiſſion of the acts, which 'the *Véda* commands to be conſtantly perform-'ed, and for a violation of the duties preſcribed 'to a houſekeeper, the atonement is faſting *one* '*day*.

205. 'He, who ſays huſh or piſh to a *Bráh-*'*men*, or thou *to a ſuperior*, muſt *immediately* 'bathe, eat nothing for the reſt of the day, and 'appeaſe him by claſping his feet with reſpect-'ful ſalutation.

206. 'For ſtriking a *Bráhmen* even with a 'blade of graſs, or tying him by the neck with 'a cloth, or overpowering him in argument, 'and adding contemptuous words, the offender 'muſt ſoothe him by falling proſtrate.

207. 'An aſſaulter of a *Bráhmen*, with intent 'to kill, ſhall remain in hell a hundred years; 'for actually ſtriking him *with the like intent*, a 'thouſand:

208. 'As many ſmall pellets of duſt as the 'blood of a *Bráhmen* collects on the ground, 'for ſo many thouſand years muſt the ſhedder 'of that blood be tormented in hell.

209. 'For a ſimple aſſault, the firſt *or com-*'*mon* penance muſt be performed; for a bat-'tery, the *third or* very ſevere penance; but

'for ſhedding blood, *without killing*, both of 'thoſe penances.

210. 'To remove the ſins, for which no 'particular penance has been ordained, the 'aſſembly muſt award a fit expiation, conſider- 'ing the ability of the ſinner *to perform it*, and 'the *nature of the* ſin.

211. 'THOSE penances, by which a man 'may atone for his crimes, I now will deſcribe 'to you; penances, which have been perform- 'ed by deities, by holy ſages, and by forefathers '*of the human race*.

212. 'WHEN a twiceborn man performs 'the *common* penance, *or that* of PRAJA'PATI, 'he muſt for three days eat only in the morn- 'ing; for three days, only in the evening; for 'three days, food unaſked *but preſented to him*; 'and for three more days, nothing.

213. 'Eating *for a whole day* the dung and 'urine of cows mixed with curds, milk, cla- 'rified butter, and water boiled with *cuśa*-graſs, 'and then faſting entirely for a *day and a* night, 'is the penance called *Sántapana*, either from 'the devout man SANTAPANA, or from *tor- 'menting*.

214. 'A twiceborn man performing the pe- 'nance, called very ſevere, *in reſpect of the com- 'mon*, muſt eat, as before, a ſingle mouthful, *or*

'*a ball of rice as large as a hen's egg*, for three 'times three days; and for the laſt three days, 'muſt wholly abſtain from food.

215. 'A *Bráhmen*, performing the ardent 'penance, muſt ſwallow nothing but hot water, 'hot milk, hot clarified butter, and hot ſteam, 'each of them for three days ſucceſſively, per-'forming an ablution, and mortifying all his 'members.

216. 'A total faſt for twelve days *and nights*, 'by a penitent with his organs controlled and 'his mind attentive, is the penance named *pa-'ráca*, which expiates all *degrees of* guilt.

217. 'If he diminiſh his food by one mouth-'ful *each day* during the dark fortnight, *eating 'fifteen mouthfuls on the day of the oppoſition*, and 'increaſe it *in the ſame proportion*, during the 'bright fortnight, *faſting entirely on the day of 'the conjunction*, and perform an ablution regu-'larly at ſunriſe, noon, and ſunſet, this is the '*chándráyana*, or the lunar penance:

218. 'Such is the *penance* called ant-ſhaped '*or narrow in the middle*; but, if he perform the 'barley-ſhaped *or broad in the middle*, he muſt 'obſerve the ſame rule, beginning with the 'bright halfmonth, and keeping under com-'mand his organs of action and ſenſe.

219. 'To perform the lunar penance of an

'anchoret, he muſt eat only eight mouthfuls
'of foreſt grains at noon *for a whole month*, tak-
'ing care to ſubdue his mind.

220. 'If a *Bráhmen* eat only four mouthfuls
'at ſunriſe, and four at ſunſet, *for a month*,
'keeping his organs controlled, he performs
'the lunar penance of children.

221. 'He, who, for a whole month, eats no
'more than thrice eighty mouthfuls of wild
'grains, *as he happens* by any means *to meet*
'*with them*, keeping his organs in ſubjection,
'ſhall attain the ſame abode with the regent of
'the moon:

222. 'The eleven *Rudras*, the twelve *A'di-*
'*tyas*, the eight *Vaſus*, the *Maruts*, or genii of
'the winds, and the ſeven great *Ríſhis*, have
'performed this lunar penance as a ſecurity
'from all evil.

223. 'The oblation *of clarified butter* to fire
'muſt every day be made by *the penitent* him-
'ſelf, accompanied with the mighty words
'*earth*, *ſky*, *heaven*; he muſt perfectly abſtain
'from injury to ſentient creatures, from falſe-
'hood, from wrath, and from all crooked
'ways.

224. 'Or, thrice each day and thrice each
'night for a month, the penitent may plunge
'into water clothed in his mantle, and at no

'time converſing with a woman, a *Súdra*, or 'an outcaſt.

225. 'LET him be always in motion, ſitting 'and riſing alternately, or, if unable *to be thus* 'reſtleſs, let him ſleep low *on the bare ground*; 'chaſte as a ſtudent of the *Véda*, bearing the 'ſacred zone and ſtaff, ſhowing reverence to 'his preceptor, to the gods, and to prieſts;

226. 'Perpetually muſt he repeat the *gáyatrì*, 'and other pure texts to the beſt of his know-'ledge: thus in all penances for abſolution from 'ſin, muſt he vigilantly employ himſelf.

227. 'By theſe expiations are twiceborn 'men abſolved, whoſe offences are publickly 'known, *and are miſchievous by their example*; 'but for ſins not publick, the aſſembly of prieſts 'muſt award them penances, with holy texts 'and oblations to fire.

228. 'BY open confeſſion, by repentance, 'by devotion, and by reading the ſcripture, a 'ſinner may be releaſed from his guilt; or by 'almſgiving, in caſe of his inability *to perform* 'the other acts of religion.

229. 'In proportion as a man, who has 'committed a ſin, ſhall truly and voluntarily 'confeſs it, ſo far he is diſengaged from that 'offence, like a ſnake from his ſlough;

230. 'And, in proportion as his heart ſin-

'cerely loathes his evil deed, ſo far ſhall his 'vital ſpirit be freed from the taint of it.

231. 'If he commit ſin, and actually repent, 'that ſin ſhall be removed from him; but if 'he merely ſay, "I will ſin thus no more," 'he can only be releaſed by an actual abſti-'nence from guilt.

232. 'Thus revolving in his mind the cer-'tainty of retribution in a future ſtate, let him 'be conſtantly good in thoughts, words, and 'action.

233. 'If he deſire complete remiſſion of any 'foul act which he has committed, either igno-'rantly or knowingly, let him beware of com-'mitting it again: *for the ſecond fault his pe-'nance muſt be doubled.*

234. 'If, having performed any expiation, 'he feel not a perfect ſatisfaction of conſcience, 'let him repeat the ſame devout act, until his 'conſcience be perfectly ſatisfied.

235. 'All the bliſs of deities and of men is 'declared by ſages, who diſcern the ſenſe of 'the *Véda*, to have in devotion its cauſe, in de-'votion its continuance, in devotion its full-'neſs.

236. 'Devotion is *equal to the performance of 'all duties; it is* divine knowledge in a *Bráh-'men*; it is defence of the people in a *Cſhatríya*; 'devotion is *the* buſineſs *of trade and agriculture*

'in a *Vaiſya*; devotion is dutiful ſervice in a 'Súdra.

237. 'Holy ſages, with ſubdued paſſions, 'feeding only on fruit, roots, and air, by devo-'tion alone are enabled to ſurvey the three 'worlds, *terreſtrial, ethereal, and celeſtial*, peopled 'with animal creatures, locomotive and fixed.

238. 'Perfect health, or unfailing medicines, 'divine learning, and the various manſions of 'deities, are acquired by devotion alone; their 'efficient cauſe is devotion.

239. 'Whatever is hard to be traverſed, what-'ever is hard to be acquired, whatever is hard 'to be viſited, whatever is hard to be perform-'ed, all this may be accompliſhed by true de-'votion; for the difficulty of devotion is the 'greateſt of all.

240. 'Even ſinners in the higheſt degree, 'and of courſe the other offenders, are abſolved 'from guilt by auſtere devotion well-practiſed.

241. '*Souls, that animate* worms, and inſects, 'ſerpents, moths, beaſts, birds, and vegetables, 'attain heaven by the power of devotion.

242. 'Whatever ſin has been conceived in 'the hearts of men, uttered in their ſpeech, or 'committed in their bodily acts, they ſpeedily 'burn it all away by devotion, if they preſerve 'devotion as their beſt wealth.

243. 'Of a prieſt, whom devotion has puri-

'fied, the divine ſpirits accept the ſacrifices, and 'grant the deſires with ample increaſe.

244. 'Even BRAHMA', lord of creatures, by 'devotion, enacted this code of laws; and the 'ſages by devotion acquired a knowledge of the '*Védas*.

245. 'Thus the gods themſelves, obſerving 'in this univerſe the incomparable power of 'devotion, have proclaimed aloud the tran-'ſcendent excellence of pious auſterity.

246. 'By reading each day as much as poſ-'ſible of the *Véda*, by performing the *five* great 'ſacraments, and by forgiving all injuries, even 'ſins of the higheſt degree ſhall be ſoon ef-'faced:

247. 'As fire conſumes in an inſtant with his 'bright flame the wood, that has been placed 'on it, thus, with the flame of knowledge, a '*Bráhmen*, who underſtands the *Véda*, conſumes 'all ſin.

248. 'Thus has been declared, according to 'law, the mode of atoning for open ſins: now 'learn the mode of obtaining abſolution for 'ſecret offences.

249. 'SIXTEEN ſuppreſſions of the breath, '*while the holieſt of texts is repeated* with the 'three mighty words, and the triliteral ſyllable, 'continued each day for a month, abſolve even

'the ſlayer of a *Bráhmen* from his hidden
'faults.

250. 'Even a drinker of ſpirituous liquors
'is abſolved by repeating each day the text *apa*
'uſed by the ſage CAUTSA, or that beginning
'with *preti* uſed by VASISHT'HA, or that called
'*máhitra*, or that, of which the firſt word is
'*ſuddhavatyah*.

251. 'By repeating *each day for a month* the
'text *áſyavámíya*, or the hymn *Sivaſancalpa*,
'the ſtealer of gold from a prieſt becomes in-
'ſtantly pure.

252. 'He, who has violated the bed of his
'preceptor, is cleared *from ſecret faults* by re-
'peating *ſixteen times a day* the text *haviſhyan-*
'*tíya*, or that beginning with *na tamanhah*, or
'by revolving in his mind the *ſixteen* holy verſes,
'called *Pauruſha*.

253. 'The man, who deſires to expiate *his*
'*hidden* ſins, great and ſmall, muſt repeat *once*
'*a day* for a year the text *ava*, or the text
'*yatcinchida*.

254. 'He, who has accepted an illegal pre-
'ſent, or eaten prohibited food, may be cleanſed
'in three days by repeating the text *taratſa-*
'*mandíya*.

255. 'Though he have committed many
'ſecret ſins, he ſhall be purified by repeating

'for a month the text *ſómáraudra* or the three 'texts *áryamna*, while he bathes in a ſacred 'ſtream.

256. 'A grievous offender muſt repeat the 'ſeven verſes, beginning with INDRA, for half 'a year; and he, who has defiled water with 'any impurity, muſt ſit a whole year ſubſiſting 'by alms.

257. 'A twiceborn man, who ſhall offer 'clarified butter for a year, with *eight* texts ap- 'propriated to *eight* ſeveral oblations, or with 'the text *na mé*, ſhall efface a ſin even of an 'extremely high degree.

258. 'He, who had committed a crime of 'the firſt degree, ſhall be abſolved, if he attend 'a herd of kine for a year, mortify his organs, 'and continually repeat the texts beginning 'with *pávamáni*, living ſolely on food given in 'charity:

259. 'Or, if he thrice repeat a *Sanhitá* of 'the *Védas*, or *a large portion of them with all* 'the mantras *and* bráhmanas, dwelling in a fo- 'reſt with ſubdued organs, and purified by three 'parácas, he ſhall be ſet free from all ſins how 'heinous ſoever.

260. 'Or he ſhall be releaſed from all deadly 'ſins, if he faſt three days, with his members 'mortified, and twice a day plunge into water, 'thrice repeating the text *aghamarſhana:*

261. 'As the ſacrifice of a horſe, the king 'of ſacrifices, removes all ſins, thus the text 'aghamarſhana deſtroys all offences.

262. 'A prieſt who ſhould retain in his me-'mory the whole *Rigvéda*, would be abſolved 'from guilt, even if he had ſlain the inhabitants 'of the three worlds, and had eaten food from 'the fouleſt hands.

263. 'By thrice repeating the *mantras* and 'brâhmanas of the *Rĭch*, or thoſe of the *Yajuſh*, 'or thoſe of the *Sáman*, with the *upaniſhads*, he 'ſhall perfectly be cleanſed from every poſſible 'taint:

264. 'As a clod of earth, caſt into a great 'lake, ſinks in it, thus is every ſinful act ſub-'merged in the triple *Véda*.

265. 'The diviſions of the *Rĭch*, the ſeveral 'branches of the *Yajuſh*, and the manifold 'ſtrains of the *Sáman* muſt be conſidered as 'forming the triple *Véda*: he knows the *Véda*, 'who knows them collectively.

266. 'The primary triliteral ſyllable, in 'which the three *Védas* themſelves are com-'priſed, muſt be kept ſecret, as another triple '*Véda*: he knows the *Veda*, who *diſtinctly* 'knows *the myſtick ſenſe of* that word.'

CHAPTER THE TWELFTH.

On Tranſmigration and final Beatitude.

1. 'O THOU, who art free from ſin, *ſaid* 'the devout ſages, thou haſt declared the whole 'ſyſtem of duties ordained for the four claſſes 'of men: explain to us now, from the firſt 'principles, the ultimate retribution for their 'deeds.'

2. BHRĬGU, whoſe heart was the pure eſſence of virtue, who proceeded from MENU himſelf, thus addreſſed the great ſages: 'Hear the in-'fallible rules for *the fruit of* deeds in this 'univerſe.

3. 'ACTION, either mental, verbal, or cor-'poreal, bears good or evil fruit, *as itſelf is good* '*or evil*; and from the actions of men proceed 'their various tranſmigrations in the higheſt, 'the mean, and the loweſt degree:

4. 'Of that threefold action, connected with 'bodily functions, diſpoſed in three claſſes, and 'conſiſting of ten orders, be it known in this 'world, that the heart is the inſtigator.

5. ‘ Deviſing means to appropriate the ‘ wealth of other men, reſolving on any forbid- ‘ den deed, and conceiving notions of atheiſm ‘ or materialiſm, are the three bad acts of the ‘ mind:

6. ‘ Scurrilous language, falſehood, indiſcri- ‘ minate backbiting, and uſeleſs tattle, are the ‘ four bad acts of the tongue:

7. ‘ Taking effects not given, hurting ſentient ‘ creatures without the ſanction of law, and ‘ criminal intercourſe with the wife of another, ‘ are the three bad acts of the body; *and all the* ‘ *ten have their oppoſites, which are good in an* ‘ *equal degree.*

8. ‘ A rational creature has a reward or ‘ a puniſhment for mental acts, in his mind; ‘ for verbal acts, in his organs of ſpeech; for ‘ corporeal acts, in his bodily frame.

9. ‘ For ſinful acts moſtly corporeal, a man ‘ ſhall aſſume *after death* a vegetable or mi- ‘ neral form; for ſuch acts moſtly verbal, the ‘ form of a bird or a beaſt; for acts moſtly ‘ mental, the loweſt of human conditions:

10. ‘ He, whoſe firm underſtanding obtains ‘ a command over his words, a command over ‘ his thoughts, and a command over his whole ‘ body, may juſtly be called a *tridandi*, or *triple* ‘ *commander*; *not a mere anchoret, who bears* ‘ *three viſible ſtaves.*

11. 'The man, who exerts this triple ſelf-'command with reſpect to all animated crea-'tures, wholly ſubduing both luſt and wrath, 'ſhall by thoſe means attain beatitude.

12. 'THAT ſubſtance, which gives a power 'of motion to the body, the wiſe call *cſhétra-'jnya*, or *jívátman*, the vital ſpirit; and that 'body, which thence derives active functions, 'they name *bhútátman*, or *compoſed of elements*:

13. 'Another internal ſpirit, called *mahat*, 'or *the great ſoul*, attends the birth of all crea-'tures imbodied, and thence in all mortal 'forms is conveyed a perception either pleaſing 'or painful.

14. 'Thoſe two, the vital ſpirit and reaſon-'able ſoul, are cloſely united with *five* ele-'ments, but connected with the ſupreme ſpirit, 'or divine eſſence, which pervades all beings 'high and low:

15. 'From the ſubſtance of that *ſupreme 'ſpirit* are diffuſed, *like ſparks from fire*, innu-'merable vital ſpirits, which perpetually give 'motion to creatures exalted and baſe.

16. 'By the vital ſouls of thoſe men, who 'have committed ſins *in the body reduced to 'aſhes*, another body, compoſed of *nerves with* 'five ſenſations, in order to be ſuſceptible of 'torment, ſhall certainly be aſſumed after 'death;

17. 'And, being intimately united with 'thoſe minute nervous particles, according to 'their diſtribution, they ſhall feel, in that new 'body, the pangs inflicted in each caſe by the 'ſentence of YAMA.

18. 'When the vital ſoul has gathered the 'fruit of ſins, which ariſe from a love of 'ſenſual pleaſure, but muſt produce miſery, 'and, when its taint has thus been removed, it 'approaches again thoſe two moſt effulgent 'eſſences *the intellectual ſoul and the divine ſpirit:*

19. 'They two, cloſely conjoined, examine 'without remiſſion the virtues and vices of that 'ſenſitive ſoul, according to its union with 'which it acquires pleaſure or pain in the pre- 'ſent and future worlds.

20. 'If the vital ſpirit had practiſed virtue 'for the moſt part and vice in a ſmall degree, 'it enjoys delight in celeſtial abodes, clothed 'with a body formed of pure elementary par- 'ticles;

21. 'But, if it had generally been addicted 'to vice, and ſeldom attended to virtue, then 'ſhall it be deſerted by thoſe pure elements, 'and, *having a coarſer body of ſenſible nerves*, it 'feels the pains to which YAMA ſhall doom it:

22. 'Having endured thoſe torments ac- 'cording to the ſentence of YAMA, and its 'taint being almoſt removed, it again reaches

'thoſe five pure elements in the order of their 'natural diſtribution.

23. 'Let each man, conſidering with his 'intellectual powers theſe migrations of the 'ſoul according to its virtue or vice, *into a 'region of bliſs or pain*, continually fix his heart 'on virtue.

24. 'BE it known, that the three qualities 'of the rational ſoul are a tendency to goodneſs, 'to paſſion, and to darkneſs; and, endued with 'one or more of them, it remains inceſſantly 'attached to all theſe created ſubſtances:

25. 'When any one of the *three* qualities 'predominates in a mortal frame, it renders 'the imbodied ſpirit eminently diſtinguiſhed 'for that quality.

26. 'Goodneſs is declared to be true know-'ledge; darkneſs, groſs ignorance; paſſion, an 'emotion of deſire or averſion: ſuch is the 'compendious deſcription of thoſe qualities, 'which attend all ſouls.

27. 'When a man perceives in the reaſon-'able ſoul a diſpoſition tending to virtuous 'love, unclouded with any malignant paſſion, 'clear as the pureſt light, let him recogniſe it 'as the quality of goodneſs:

28. 'A temper of mind, which gives un-'eaſineſs and produces diſaffection, let him 'conſider as the adverſe quality of paſſion, 'ever agitating imbodied ſpirits:

29. 'That indiſtinct, inconceivable, unac-
'countable diſpoſition of a mind naturally
'ſenſual, and clouded with infatuation, let
'him know to be the quality of darkneſs.

30. 'Now will I declare at large the va-
'rious acts, in the higheſt, middle, and loweſt
'degrees, which proceed from thoſe three diſ-
'poſitions of mind.

31. 'Study of ſcripture, auſtere devotion,
'ſacred knowledge, corporeal purity, com-
'mand over the organs, performance of duties,
'and meditation on the divine ſpirit, accom-
'pany the good quality of the ſoul:

32. 'Intereſted motives for acts *of religion or*
'*morality*, perturbation of mind on ſlight oc-
'caſions, commiſſion of acts forbidden by law,
'and habitual indulgence in ſelfiſh gratifica-
'tions, are attendant on the quality of paſ-
'ſion:

33. 'Covetouſneſs, indolence, avarice, de-
'traction, atheiſm, omiſſion of preſcribed acts,
'a habit of ſoliciting favours, and inattention
'to neceſſary buſineſs, belong to the dark
'quality.

34. 'Of thoſe three qualities, as they appear
'in the three times, *paſt*, *preſent and future*,
'the following in order *from the loweſt* may be
'conſidered as a ſhort *but certain* criterion.

35. 'Let the wiſe conſider, as belonging to
'the quality of darkneſs, every act which a

'man is aſhamed of having done, of doing, or
'of going to do:

36. 'Let them conſider, as proceeding from
'the quality of paſſion, every act, by which a
'man ſeeks exaltation and celebrity in this
'world, though he may not be much afflicted,
'if he fail of attaining his object:

37. 'To the quality of goodneſs belongs
'every act, by which he hopes to acquire di-
'vine knowledge, which he is never aſhamed
'of doing and which brings placid joy to his
'conſcience.

38. 'Of the dark quality, as deſcribed, the
'principal object is pleaſure; of the paſſionate,
'worldly proſperity; but of the good quality,
'the chief object is virtue: the laſt mentioned
'*objects* are ſuperiour in dignity.

39. 'SUCH tranſmigrations, as the ſoul pro-
'cures in this univerſe by each of thoſe quali-
'ties, I now will declare in order ſuccinctly.

40. 'Souls, endued with goodneſs, attain al-
'ways the ſtate of deities; thoſe filled with
'ambitious paſſions, the condition of men; and
'thoſe immerſed in darkneſs, the nature of
'beaſts: this is the triple order of tranſmigra-
'tion.

41. 'Each of thoſe three tranſmigrations,
'cauſed by the ſeveral qualities, muſt alſo be
'conſidered as threefold, the loweſt, the mean,

'and the higheſt, according to as many di-
'ſtinctions of acts and of knowledge.

42. 'Vegetable and mineral ſubſtances,
'worms, inſects, and reptiles, ſome very mi-
'nute, ſome rather larger, fiſh, ſnakes, tor-
'toiſes, cattle, ſhakals, are the loweſt forms, to
'which the dark quality leads:

43. 'Elephants, horſes, men of the ſervile
'claſs, and contemptible *Mléch'has*, or *barbari-*
'*ans*, lions, tigers, and boars, are the mean
'ſtates procured by the quality of darkneſs:

44. 'Dancers and ſingers, birds and deceit-
'ful men, giants and bloodthirſty ſavages, are
'the higheſt conditions, to which the dark
'quality can aſcend.

45. '*J'hallas*, or cudgelplayers, *Mallas*, or
'boxers and wreſtlers, *Natas*, or actors, thoſe
'who teach the uſe of weapons, and thoſe who
'are addicted to gaming or drinking, are the
'loweſt forms occaſioned by the paſſionate
'quality:

46. 'Kings, men of the fighting claſs, do-
'meſtick prieſts of kings, and men ſkilled in the
'war of controverſy, are the middle ſtates
'cauſed by the quality of paſſion:

47. '*Gandharvas*, or aerial muſicians, *Guhy-*
'*acas* and *Yacſhas*, or ſervants and companions
'of CUVE'RA, genii attending ſuperiour gods,
'as the *Vidyádharas* and others, together with

'various companies of *Apſaraſes*, or nymphs, 'are the higheſt of thoſe forms, which the 'quality of paſſion attains.

48. 'Hermits, religious mendicants, other '*Bráhmens*, ſuch orders of demigods as are 'wafted in airy cars, genii of the ſigns and 'lunar manſions, and *Daityas*, or the offspring 'of DITI, are the loweſt of ſtates procured by 'the quality of goodneſs:

49. 'Sacrificers, holy ſages, deities of the 'lower heaven, genii of the *Védas*, regents of 'ſtars *not in the paths of the ſun and moon*, di- 'vinities of years, *Pitrĭs* or progenitors of 'mankind, and the demigods, named *Sádhyas*, 'are the middle forms, to which the good 'quality conveys *all ſpirits moderately endued* 'with it:

50. 'BRAHMA' with four faces, creators of 'worlds *under him, as* MARI'CHI *and others*, the 'genius of virtue, the divinities preſiding over '(*two principles of nature in the philoſophy of* 'CAPILA) *mahat*, or the *mighty*, and *avyacta*, 'or *unperceived*, are the higheſt conditions, to 'which, by the good quality, ſouls are exalted.

51. 'This triple ſyſtem of tranſmigrations, 'in which each claſs has three orders, accord- 'ing to actions of three kinds, and which com- 'priſes all animated beings, has been revealed 'in its full extent;

52. 'Thus, by indulging the ſenſual appe-
'tites, and by neglecting the performance of
'duties, the baſeſt of men, ignorant of ſacred
'expiations, aſſume the baſeſt forms.

53. 'WHAT particular bodies the vital ſpirit
'enters in this world, and in conſequence of
'what ſins here committed, now hear at large
'and in order.

54. 'Sinners in the firſt degree, having
'paſſed through terrible regions of torture for
'a great number of years, are condemned to
'the following births at the cloſe of that period
'*to efface all remains of their ſin.*

55. 'The ſlayer of a *Bráhmen* muſt enter
'*according to the circumſtances of his crime* the
'body of a dog, a boar, an aſs, a camel, a bull,
'a goat, a ſheep, a ſtag, a bird, a *Chandála,* or a
'*Puccaſa.*

56. 'A prieſt, who has drunk ſpirituous
'liquor, ſhall migrate into the form of a
'ſmaller or larger worm or inſect, of a moth,
'of a fly feeding on ordure, or of ſome raven-
'ous animal.

57. 'He, who ſteals the gold of a prieſt,
'ſhall paſs a thouſand times into the bodies of
'ſpiders, of ſnakes and cameleons, of *crocodiles*
'*and other* aquatick monſters, or of miſchievous
'blood ſucking demons.

58. 'He, who violates the bed of his *natural*

'*or ſpiritual* father, migrates a hundred times 'into the forms of graſſes, of ſhrubs with 'crowded ſtems, or of creeping and twining 'plants, of *vultures and other* carnivorous ani- 'mals, of *lions and other* beaſts with ſharp teeth, 'or of *tigers and other* cruel brutes.

59. 'They who hurt any ſentient beings, 'are born *cats and other* eaters of raw fleſh; 'they, who taſte what ought not to be taſted, 'maggots or ſmall flies; they, who ſteal *ordi-* 'nary things, devourers of each other: they 'who embrace very low women, become reſt- 'leſs ghoſts.

60. 'He, who has held intercourſe with 'degraded men, or been criminally connected 'with the wife of another, or ſtolen *common* 'things from a prieſt, ſhall be changed into a 'ſpirit, called *Brahmarácſhaſa*.

61. 'The wretch, who through covetouſ- 'neſs has ſtolen *rubies or other* gems, pearls, or 'coral, or precious things of which there are 'many ſorts, ſhall be born *in the tribe of gold-* 'ſmiths, *or* among *birds called* hémacáras, or 'goldmakers.

62. 'If a man ſteal grain in the huſk, he 'ſhall be born a rat; if a yellow mixed metal, 'a gander; if water, a *plava*, or diver; if 'honey, a great ſtinging gnat; if milk, a crow; 'if expreſſed juice, a dog; if clarified butter, an 'ichneumon weaſel;

63. 'If he ſteal fleſhmeat, a vulture; if any 'ſort of fat, the water-bird *madgu*; if oil, a 'blatta, or oildrinking beetle; if ſalt, a cicada 'or cricket; if curds, the bird *valáca*;

64. 'If ſilken clothes, the bird *tittiri*; if 'woven flax, a frog; if cotton cloth, the 'waterbird *crauncha*; if a cow, the lizard '*gódhá*; if molaſſes, the bird *vágguda*;

65. 'If exquiſite perfumes, a muſkrat; if pot-'herbs, a peacock; if dreſſed grain in any of 'its various forms, a porcupine; if raw grain, 'a hedgehog;

66. 'If he ſteal fire, the bird *vaca*; if a 'houſehold uteſinl, an ichneumon-fly; if dyed 'cloth, the bird *chácóra*;

67. 'If a deer or an elephant, he ſhall 'be born a wolf; if a horſe, a tiger; if roots or 'fruit, an ape; if a woman, a bear; if water 'from a jar, the bird *chátaca*; if carriages, a 'camel; if ſmall cattle, a goat.

68. 'That man, who deſignedly takes away 'the property of another, or eats any holy 'cakes not firſt preſented *to the deity* at a 'ſolemn rite, ſhall inevitably ſink to the con-'dition of a brute.

69. 'Women, who have committed ſimilar 'thefts, incur a ſimilar taint, and ſhall be 'paired with thoſe male beaſts in the form 'of their females.

70. 'If any of the four claſſes omit, without

'urgent neceſſity, the performance of their 'ſeveral duties, they ſhall migrate into ſinful 'bodies, and become ſlaves to their foes.

71. 'Should a *Bráhmen* omit his peculiar 'duty, he ſhall be changed into a demon called '*Ulcámuc'ha* or *with a mouth like a firebrand*, 'who devours what has been vomited; a *Cſha-'triya*, into a demon called *Cataplítana*, who 'feeds on ordure and carrion;

72. 'A *Vaiſya*, into an evil being called '*Maitrácſhajyótica*, who eats purulent carcaſſes; 'and a *Súdra*, who neglects his occupations, 'becomes a foul imbodied ſpirit called *Chailá-'ſaca*, who feeds on lice.

73. 'As far as vital ſouls, addicted to ſen-'ſuality, indulge themſelves in forbidden plea-'ſures, even to the ſame degree ſhall the acute-'neſs of their ſenſes be raiſed *in their future 'bodies, that they may endure analogous pains;*

74. 'And, in conſequence of their folly, they 'ſhall be doomed as often as they repeat their 'criminal acts, to pains more and more intenſe 'in deſpicable forms on this earth.

75. 'They ſhall firſt have a ſenſation of 'agony in *Támiſra* or *utter darkneſs*, and in 'other ſeats of horrour; in *Aſipatravana*, or '*the ſwordleaved foreſt*, and in different places 'of binding faſt and of rending:

76. 'Multifarious tortures await them: they

'ſhall be mangled by ravens and owls, ſhall 'ſwallow cakes boiling hot; ſhall walk over 'inflamed ſands; and ſhall feel the pangs of 'being baked like the veſſels of a potter:

77. 'They ſhall aſſume the forms of beaſts 'continually miſerable, and ſuffer alternate af-'flictions from extremities of cold and of heat, 'ſurrounded with terrours of various kinds:

78. 'More than once ſhall they lie in differ-'ent wombs; and, after agonizing births, be 'condemned to ſevere captivity, and to ſervile 'attendance on creatures like themſelves:

79. 'Then ſhall follow ſeparations from kin-'dred and friends, forced reſidence with the 'wicked, painful gains and ruinous loſſes of 'wealth; friendſhips hardly acquired and at 'length changed into enmities,

80. 'Old age without reſource, diſeaſes at-'tended with anguiſh, pangs of innumerable 'ſorts, and, laſtly, unconquerable death.

81. 'With whatever diſpoſition of mind a 'man ſhall perform in this life any act *religious* '*or moral*, in a future body endued with the 'ſame quality, ſhall he receive his retribution.

82. 'THUS has been revealed to you the 'ſyſtem of puniſhments for evil deeds: next 'learn thoſe acts of a *Brâhmen*, which lead to 'eternal bliſs.

83. 'Studying and comprehending the *Véda*,

'practiſing pious auſterities, acquiring divine 'knowledge *of law and philoſophy*, command 'over the organs of ſenſe and action, avoiding 'all injury to ſentient creatures, and ſhowing 'reverence to a *natural and ſpiritual* father, are 'the chief branches of duty which enſure final 'happineſs.'

84. 'Among all thoſe good acts performed 'in this world, *ſaid the ſages*, is no ſingle act 'held more powerful than the reſt in leading 'men to beatitude?'

85. 'Of all thoſe duties, *anſwered* BHRĬGU, 'the principal is to acquire from the *Upaniſhads* 'a true knowledge of one ſupreme GOD; that 'is the moſt exalted of all ſciences, becauſe it 'enſures immortality:

86. 'In this life, indeed, as well as the next, 'the ſtudy of the *Véda*, to acquire a knowledge 'of GOD, is held the moſt efficacious of thoſe 'ſix duties in procuring felicity to man;

87. 'For in the knowledge and adoration of 'one GOD, which the *Véda* teaches, all the 'rules of good conduct, *beforementioned* in order, 'are fully compriſed.

88. 'The ceremonial duty, preſcribed by the '*Véda*, is of two kinds; *one* connected with this 'world, and cauſing proſperity on earth; *the* 'other abſtracted from it, and procuring bliſs 'in heaven.

89. 'A religious act proceeding from selfish 'views in this world, *as a sacrifice for rain*, or 'in the next, *as a pious oblation in hope of a fu-* 'ture reward, is declared to be concrete and in- 'terested; but an act performed with a know- 'ledge of GOD, and without self love, is called 'abstract and disinterested.

90. 'He, who frequently performs interested 'rites, attains an equal station with the regents 'of the lower heaven; but he, who frequently 'performs disinterested acts of religion, becomes 'for ever exempt from *a body composed of* the 'five elements:

91. 'Equally perceiving the supreme soul 'in all beings and all beings in the supreme 'soul, he sacrifices his own spirit by fixing it on 'the spirit of GOD, and approaches the nature 'of that sole divinity, who shines by his own 'effulgence.

92. 'Thus must the chief of the twiceborn, 'though he neglect the ceremonial rites men- 'tioned in the *Sástras*, be diligent alike in at- 'taining a knowledge of GOD and in repeating 'the *Véda:*

93. 'Such is the advantageous privilege of 'those, who have a double birth *from their na-* 'tural mothers and from the gáyatrì *their spiritual* 'mother, especially of a *Bráhmen*; since the 'twiceborn man by performing this duty but

'not otherwiſe, may ſoon acquire endleſs fe-
'licity.

94. 'To patriarchs, to deities, and to man-
'kind, the ſcripture is an eye giving conſtant
'light; nor could the *Véda Sáſtra* have been
'made by human faculties; nor can it be mea-
'ſured by human reaſon *unaſſiſted by revealed*
'*gloſſes and comments:* this is a ſure propoſition.

95. 'Such codes of law as are not grounded
'on the *Véda*, and the various heterodox theo-
'ries of men, produce no good fruit after death;
'for they all are declared to have their baſis on
'darkneſs.

96. 'All ſyſtems, which are repugnant to
'the *Véda*, muſt have been compoſed by mor-
'tals, and ſhall ſoon periſh: their modern date
'proves them vain and falſe.

97. 'The three worlds, the four claſſes of
'men, and their four diſtinct orders, with all
'that has been, all that is, and all that will be,
'are made known by the *Véda:*

98. 'The nature of ſound, of tangible and
'viſible ſhape, of taſte, and of odour, the fifth
'object of ſenſe, is clearly explained in the *Véda*
'alone, together with the three qualities of
'mind, the births attended with them, and the
'acts which they occaſion.

99. 'All creatures are ſuſtained by the pri-
'meval *Véda Sáſtra*, which the wiſe therefore

'hold ſupreme, becauſe it is the ſupreme ſource
'of proſperity to this creature, man.

100. 'Command of armies, royal authority,
'power of inflicting puniſhment, and ſovereign
'dominion over all nations, he only well de-
'ſerves, who perfectly underſtands the *Véda*
'*Sáſtra*.

101. 'As fire with augmented force burns
'up even humid trees, thus he, who well knows
'the *Véda*, burns out the taint of ſin, which has
'infected his ſoul.

102. 'He, who completely knows the ſenſe
'of the *Véda Sáſtra*, while he remains in any
'one of the four orders, approaches the divine
'nature, even though he ſojourn in this low
'world.

103. 'They, who have read many books, are
'more exalted than ſuch, as have ſeldom ſtu-
'died; they, who retain what they have read,
'than forgetful readers; they, who fully under-
'ſtand, than ſuch as only remember; and they,
'who perform their known duty, than ſuch
'men, as barely know it.

104. 'Devotion and ſacred knowledge are
'the beſt means by which a *Bráhmen* can arrive
'at beatitude: by devotion he may deſtroy
'guilt; by ſacred knowledge he may acquire
'immortal glory.

105. 'Three modes of proof, ocular demon-

'ſtration, logical inference, and the authority 'of thoſe various books, which are deduced 'from the *Véda*, muſt be well underſtood by 'that man, who ſeeks a diſtinct knowledge of 'all his duties:

106. 'He alone comprehends the ſyſtem of 'duties religious and civil, who can reaſon, by 'rules of logic agreeable to the *Véda*, on the 'general heads of that ſyſtem as revealed by 'the holy ſages.

107. 'Theſe rules of conduct, which lead to 'ſupreme bliſs, have been exactly and compre-'henſively declared: the more ſecret learning 'of this *Mánava Sáſtra* ſhall now be diſcloſed.

108. 'If it be aſked, how the law ſhall be 'aſcertained, when particular caſes are not 'compriſed *under any of the general rules, the* 'anſwer is this: "That, which well inſtructed "*Bráhmens* propound, ſhall be held inconteſtible "law."

109. 'Well inſtructed *Bráhmens* are they, 'who can adduce ocular proof from the ſcrip-'ture itſelf, having ſtudied, as the law ordains, 'the *Védas* and their extended branches, or '*Védángas*, *Mímánſá*, *Nyáya*, *Dhermaſáſtra*, '*Puránas*:

110. 'A point of law, *before not expreſsly re-'vealed*, which ſhall be decided by an aſſembly 'of ten ſuch virtuous *Bráhmens* under one chief,

'or, *if ten be not procurable*, of three ſuch un-
'der one preſident, let no man controvert.

111. 'The aſſembly of ten under a chief
'*either the king himſelf or a judge appointed by*
'*him*, muſt conſiſt of three, each of them pecu-
'liarly converſant with one of the three *Védas*,
'of a fourth ſkilled in the *Nyáya*, and a fifth
'in the *Mímánſà* philoſophy; of a ſixth, who
'has particularly ſtudied the *Niructa*; a ſeventh,
'who has applied himſelf moſt aſſiduouſly to
'the *Dhermaſáſtra*; and of three *univerſal ſcho-*
'*lars*, who are in the three firſt orders.

112. 'One, who has chiefly ſtudied the *Rĭg-*
'*vêda*, a ſecond, who principally knows the
'*Yajuſh*, and a third beſt acquainted with the
'*Sáman*, are the aſſembly of three under a head,
'who may remove all doubts both in law and
'caſuiſtry.

113. 'Even the deciſion of one prieſt, *if*
'*more cannot be aſſembled*, who perfectly knows
'the principles of the *Védas*, muſt be conſidered
'as law of the higheſt authority; not the opinion
'of myriads, who have no ſacred knowledge.

114. 'Many thouſands of *Bráhmens* cannot
'form a legal aſſembly for the deciſion of con-
'teſts, if they have not performed the duties of
'a regular ſtudentſhip, are unacquainted with
'ſcriptural texts, and ſubſiſt only by *the name*
'*of* their ſacerdotal claſs.

115. 'The ſin of that man, to whom dunces, 'pervaded by the quality of darkneſs, propound 'the law, of which they are themſelves igno- 'rant, ſhall paſs, increaſed a hundredfold, to 'the wretches who propound it.

116. 'This comprehenſive ſyſtem of duties, 'the chief cauſe of ultimate felicity, has been 'declared to you; and the *Bráhmen*, who never 'departs from it, ſhall attain a ſuperiour ſtate 'above.

117. 'THUS did the allwiſe MENU, who 'poſſeſſes extenſive dominion, and blazes with 'heavenly ſplendour, diſcloſe to me, from his 'benevolence to mankind, this tranſcendant 'ſyſtem of law, which muſt be kept devoutly 'concealed *from perſons unfit to receive it.*

118. 'LET every *Bráhmen* with fixed atten- 'tion conſider all nature, both viſible and invi- 'ſible, as exiſting in the divine ſpirit; for, 'when he contemplates the boundleſs univerſe 'exiſting in the divine ſpirit, he cannot give 'his heart to iniquity:

119. 'The divine ſpirit alone is the whole 'aſſemblage of gods; all worlds are ſeated in 'the divine ſpirit, and the divine ſpirit no doubt 'produces *by a chain of cauſes and effects conſiſt-* 'ent with free will, the connected ſeries of acts 'performed by imbodied ſouls.

120. 'He may contemplate the ſubtil ether

'in the cavities of his body; the air in his 'muſcular motion and ſenſitive nerves; the ſu- 'preme *ſolar and igneous* light, in his digeſtive 'heat and his viſual organs; in his corporeal 'fluids, water; in the terrene parts of his fa- 'brick, earth;

121. 'In his heart, the moon; in his audi- 'tory nerves, the guardians of eight regions; 'in his progreſſive motion, VISHNU; in his 'muſcular force, HARA; in his organs of 'ſpeech, AGNI; in excretion, MITRA; in pro- 'creation, BRAHMA:

122. 'But he muſt conſider the ſupreme 'omnipreſent intelligence as the ſovereign lord 'of them all, *by whoſe energy alone they exiſt*; a 'ſpirit, *by no means the object of any ſenſe*, which 'can only be conceived by a mind *wholly ab- 'ſtracted from matter, and as it were* ſlumbering; 'but which *for the purpoſe of aſſiſting his medi- 'tation*, he may imagine more ſubtil than the 'fineſt conceivable eſſence, and more bright 'than the pureſt gold.

123. 'Him ſome adore as tranſcendently 'preſent in elementary fire; others, in MENU, 'lord of creatures, *or an immediate agent in the 'creation*; ſome, as more diſtinctly preſent in 'INDRA, *regent of the clouds and the atmoſphere*; 'others, in pure air; others, as the moſt High 'Eternal Spirit.

124. 'It is He, who, pervading all beings in 'five elemental forms, cauſes them by the 'gradations of birth, growth, and diſſolution, 'to revolve in this world, *until they deſerve beati-* 'tude, like the wheels of a car.

125. 'Thus the man, who perceives in his 'own ſoul the ſupreme ſoul preſent in all crea- 'tures, acquires equanimity toward them all, 'and ſhall be abſorbed at laſt in the higheſt eſ- 'ſence, even that of the Almighty himſelf.'

126. HERE ended the ſacred inſtructor; and every twiceborn man, who, attentively reading this *Mánava Sáſtra* promulgated by BHRĬGU, ſhall become habitually virtuous, will attain the beatitude which he ſeeks.

GENERAL NOTE.

THE learned *Hindus* are unanimouſly of opinion, that many laws enacted by MENU, their oldeſt reputed legiſlator, were confined to the three firſt ages of the world, and have no force in the preſent age, in which a few of them are certainly obſolete; and they ground their opinion on the following texts, which are collected in a work entitled *Mandana ratna pradípa:*

I. CRATU: In the *Cali* age a ſon muſt not be begotten *on a widow* by the brother *of the deceaſed huſband*; nor muſt a damſel, *once* given away *in marriage*, be given a *ſecond time*; nor muſt a bull be offered in a ſacrifice; nor muſt a waterpot be carried *by a ſtudent in theology*.

II. VRIHASPATI: 1. Appointments *of kinſmen to beget children on widows, or married women, when the huſbands are deceaſed or impotent*, are mentioned by the ſage MENU, but forbidden by himſelf with a view to the order of the

four ages: no ſuch act can be legally done in this age by any others *than the huſband.*

2. In the firſt and ſecond ages men were endued with true piety and ſound knowledge; ſo *they were* in the third age; but in the fourth, a diminution of their *moral and intellectual* powers was ordained *by their Creator:*

3. Thus were ſons of many different ſorts made by ancient ſages, but ſuch cannot now be adopted by men deſtitute of thoſe eminent powers.

III. PARA'SARA: 1. A man, *who has held intercourſe with a deadly ſinner*, muſt abandon his country in the firſt age; he muſt leave his town, in the ſecond; his family, in the third age; but in the fourth he needs only deſert the offender.

2. In the firſt age, he is degraded by mere converſation with a degraded man; in the ſecond, by touching him; in the third, by receiving food from him; but in the fourth, the ſinner alone bears his guilt.

IV. NA'RADA: The procreation of a ſon by a brother *of the deceaſed*, the ſlaughter of cattle in the entertainment of a gueſt, the repaſt on fleſhmeat at funeral obſequies, and the order of a hermit *are forbidden or obſolete in the fourth age.*

V. *A'ditya purána:* 1. What was a duty in the

firſt age muſt not *in all caſes* be done in the fourth; ſince, in the *Cáli yuga*, both men and women are addicted to ſin:

2. Such are a ſtudentſhip continued for a very long time, and the neceſſity of carrying a waterpot, marriage with a paternal kinſwoman, or with a near maternal relation, and the ſacrifice of a bull,

3. Or of a man, or of a horſe: and all ſpirituous liquor muſt in the *Cali* age be avoided by twiceborn men; ſo muſt a ſecond gift of a married young woman, *whoſe huſband has died before conſummation*, and the larger portion of an eldeſt brother, and procreation on a brother's widow or wife.

VI. *Smṛiti:* 1. The appointment of a man to beget a ſon on the widow of his brother; the gift of a young married woman to another bridegroom, *if her huſband ſhould die* while ſhe remains a virgin;

2. The marriage of twiceborn men with damſels not of the ſame claſs; the ſlaughter, in a religious war, of *Bráhmens*, who are aſſailants with intent to kill;

3. Any intercourſe with a twiceborn man, who has paſſed the ſea in a ſhip, even though he have performed an expiation: performan[illegible] ſacrifices for all ſorts of men; and [illegible] carrying a waterpot;

4. Walking on a pilgrimage till the pilgrim die; and the ſlaughter of a bull at a ſacrifice; the acceptance of ſpirituous liquor, even at the ceremony called *Sautrámani*;

5. Receiving what has been licked off, at an oblation to fire, from the pot of clarified butter; entrance into the third order, or that of a hermit, though ordained *for the firſt ages*;

6. The diminution of crimes in proportion to the religious acts and ſacred knowledge *of the offenders*; the rule of expiation for a *Bráhmen* extending to death;

7. The ſin of holding any intercourſe with ſinners; the ſecret expiation of any great crimes except theft; the ſlaughter of cattle in honour of eminent gueſts or of anceſtors;

8. The filiation of any but a ſon legally begotten or given in adoption *by his parents*; the deſertion of a lawful wife for any offence leſs than actual adultery:

9. Theſe *parts of ancient law* were abrogated by wiſe legiſlators, as the caſes aroſe at the beginning of the *Cali* age, with an intent of ſecuring mankind from evil.

On the preceding texts it muſt be remarked, that none of them, except that of VRĬHASPATI, are cited by CULLU'CA, who never ſeems to have conſidered any other laws of MENU as reſtrained to the three firſt ages; that the *Smrĭti*,

or ſacred code, is quoted without the name of the legiſlator; and that the prohibition, in any age, of *ſelf-defence*, even againſt *Bráhmens*, is repugnant to a text of SUMANTU, to the precept and example of CRISHNA himſelf, according to the *Mahábhárat*, and even to a ſentence in the *Véda*, by which every man is commanded *to defend his own life from all* violent aggreſſors.

Calcutta, March 1, 1794.

SIR,

THE Inſtitutes of Hindu Law have been very correctly printed, and the whole impreſſion has juſt been ſent to the Governor and Council, who will not fail to tranſmit copies for the King's library, for yourſelf, and for the Directors. If I had obtained his Majeſty's leave to reſign my office, nothing would now keep me here, but the Digeſt of Indian Laws, conſiſting of nine large volumes, two of which remain to be collated and ſtudied with the learned Bráhmen, who aſſiſts me: he is old and infirm; but, ſhould he be able to attend me another year, or two years at the very utmoſt, the whole work will be finiſhed, and I ſhall copy it during my voyage, if the King ſhall graciouſly permit me to leave India.

I, therefore, intreat you, Sir, to lay before his Majeſty, my humble ſupplication for his gracious permiſſion to reſign my judgeſhip in the year 1795, or (if the Digeſt ſhould not then be completed) in 1796; it being my anxious wiſh to paſs the remainder of my life in ſtudious retirement, though devoted, as I ever have been,

to the ſervice of my King and my Country, and of that recorded Conſtitution, which is the baſis of our national glory and felicity.

I have the honour to be, Sir,
your very obedient
humble Servant.

The Right Hon. Henry Dundas, Eſq.

THE

MAHOMEDAN LAW

OF

SUCCESSION

TO

THE PROPERTY OF INTESTATES,

IN

ARABICK,

ENGRAVED ON COPPER PLATES

FROM

AN ANCIENT MANUSCRIPT:

WITH

A VERBAL TRANSLATION, AND EXPLANATORY NOTES.

THE

PREFACE.

NOTHING more ſeems neceſſary, in order to explain the object of the following work, than barely to cite the late ſtatute concerning *the adminiſtration of juſtice in* BENGAL; by the *ſeventeenth* ſection of which it is enacted, "That "the Supreme Court of Judicature at *Fort William* ſhall have full power to *hear and determine* all manner of actions and ſuits againſt "the inhabitants of *Calcutta*, provided that "their *inheritance and ſucceſſion to lands, rents, and goods*, and all matters of contract and "dealing between party and party, ſhall be "determined, *in the caſe of* Mahomedans, *by the laws and uſages of* MAHOMEDANS, and, "where only *one* of the parties ſhall be a Mahomedan, by the laws and uſages of *the defendant:*" by the *twenty-firſt* ſection, the *provincial* courts of *Adálet*, or *Juſtice*, are expreſsly recogniſed, and the powers of the governor and council, as the *Sedr Adálet*, in determining civil

cauſes on appeals from thoſe courts, are fully eſtabliſhed in conformity to the old *Mogul* conſtitution.

But it may naturally be aſked, how the judges of the Supreme Court, the provincial councils and council general, in *India*, or the great court of appeal in this kingdom, can juſtly exerciſe their ſeveral powers in ſuits between *Mahomedan* parties, without being at all acquainted with the law, by which they are bound to decide. Perpetual references to native lawyers muſt always be inconvenient and precarious; ſince the ſolidity of their anſwers muſt depend on their integrity, as well as their learning; and at beſt, if they be neither influenced nor ignorant, the court will not in truth *hear and determine* the cauſe, but merely pronounce judgement on the report of other men.

For theſe reaſons it appears indubitable, that a knowledge of *Mahomedan* juriſprudence (I ſay nothing here of the *Hindú* learning,) and conſequently of the *languages* uſed by *Mahomedan* writers, are eſſential to a complete adminiſtration of juſtice in our *Aſiatick* territories; a knowledge I mean, though not equal to that of the MUFTI at *Conſtantinople*, yet ſufficient for the purpoſe of keeping a check over the native counſellors, of underſtanding and examining their opinion, and of rejecting or adopting it, as

it may be oppoſed or ſupported by their books of allowed authority, to which they ſhould conſtantly refer.

A conſiderable number of thoſe books have been brought to *England* by the curious in different ages, and are now repoſited in our Academical libraries: in the *Bodleian*, eſpecially, we have many treatiſes and diſſertations in *Arabick* on *wills*, *inheritances*, *contracts*, and other important heads; particularly in the fine collection made at *Aleppo* by the learned POCOCK, from one of whoſe moſt valuable manuſcripts (n. 33.) this little work has been traced through tranſparent paper, and engraved with ſuch accuracy, that the plates muſt have equal authority in *Aſia* with the original pages, which are near *five hundred years* old.

The author, a native of *Alrahaba*, in *Meſopotamia*, was himſelf an IMAM; and his deciſions are, on that account, conſidered as binding by the ſect of *Ali*, which the *Indian*, as well as the *Perſian*, Mahomedans profeſs; but IBNO'LMOTAKANNA informs us, that he drew his knowledge from the fountain head, and has epitomiſed the ſyſtem of *Zaid*, who was recommended by MAHOMED himſelf as the ſureſt interpreter of his laws, and who had been implicitly followed by SHAFIEI, the firſt writer on *Mahomedan* juriſprudence, in the *eighth* cen-

tury of our era, and compoſer of the *Oſûl*, or *Principles* of law, with other tracts highly valued by the learned of his religion and country.

Hence it is certain, that the *Bigyato'l báhith* may be cited, as a book of authority, in all the *Muſleman* courts; and the *European* reader muſt not be ſurpriſed, to ſee ſuch a work written in a kind of looſe metre, and even in rhyme: *a lawtract in verſe* conveys, indeed, rather a ludicrous idea, ſince poetry belongs to *imagination*, which law, whoſe province is pure *reaſon*, wholly excludes; but *verſe*, as numberleſs inſtances prove, *is not always poetry*; and a regular meaſure is ſo conſiderable an aid to the *memory*, that, if the *metrical abridgement of* COKE's *Reports* were more accurate, and the couplets a little ſmother, every ſtudent ſhould be adviſed to get it by heart. I may add, without enlarging upon the *Agathyrſi* and the *Turdetani*, who, as we are told by *Ariſtotle* and *Strabo*, had *laws in verſe of the remoteſt antiquity*, that the ALCORAN itſelf, the great ſource of *Mahomedan* law, is compoſed in ſentences not only modulated with art, but often exactly rhymed; ſo that in *Aſia* this apology would have been needleſs. Verbal tranſlations are generally naked and inſipid, wholly deſtroying all the neatneſs and beauty of the original, yet retaining ſo much of the foreign idiom and manner, as to appear

always uncouth, often ridiculous; but elegance, on a ſubject ſo delicate as law, muſt be ſacrificed without mercy to exactneſs; and for this reaſon I have rendered the *Arabian* treatiſe, line for line, and word for word, with a fidelity almoſt religiouſly ſcrupulous.

As it was never my intention to compoſe a perfect work upon the law of inheritances among the *Mahomedans*, it cannot be reaſonably expected, that I ſhould ſubjoin a commentary, or prefix a long diſcourſe: very few marginal notes were thought neceſſary; but, if the brevity of the original ſhould make parts of it rather obſcure, the *Britiſh* lawyers in *India*, for whoſe uſe chiefly this production was deſigned, will eaſily obtain a clear explanation both of the language and matter from native interpreters.

The *fourth* chapter of the *Alcoran* may throw light, if any be wanted, on the doctrine of the *forúdh* or *portions*; and, as to the *arithmetical* part, it ſeems of little conſequence, as our rules of *three*, and thoſe for the reduction of *fractions*, are common and familiar to all.

The preſent publication will anſwer, I conceive, another purpoſe by no means unimportant; as it will habituate the ſtudent of eaſtern languages to the reading of old *Arabian* manuſcripts; but, leſt the hand-writing of the very learned *Saad Al Siváſi*, for that was the name

of the tranſcriber, ſhould perplex beginners, I have printed the whole tract, for their ſake, in *Roman* letters, diſtinguiſhing every conſonant and *long* vowel (the *ſhort* ones are too vague and indeterminate) by a character invariably appropriated to it; ſo as *to give every full ſound its own ſpecifick ſymbol*; an advantage, which hardly any alphabet has, but which all ought to have.

Bigyah'o 'lbáhhithi ân jumali 'lmowárithi
nadh"mo 'lſhaíkhi álímámi álâálimi
mowáffiki 'ldeíni ábeí âbdillahi
mohhammedi 'bni âleí íbni 'lhhoſaíni
álrahhabiyyi álmârúfi bi 'bni 'l
motakannah'i rahhamaho állaho taâálaí.

Biſmi 'llahi álrahhmani álrahheími wabihi neſtaêíno.

[1]

áwwalo má neſtaftihho 'lmekálá
bidhicri hhamdi rabbiná taâálá
fálhhamdo lillahi àlaí má ánâmá
hhamdán' bihi nejlúá âni 'lâini 'lâmá
thomma álsalwah'o bâdo wálſalámo
âlaí nebiyyin' deínoho álíſlamo
mohhammedin' khátimi ruſli rabbihi
waálihi min bâdihi was'ahhbihi
waneſalo 'llaha liná 'líâánah'a
feímá tawakhkhaínná min álíbánah'a
ân medh-hebi 'límámi zaídi 'lfaradh'eí
ídh cána dháca min áhammi 'lgaradh'i
îlmán' biánna 'lîlmo áúfá má ſoêï'
feíhi waáúlá má leho 'lâbdo doêí
waánna hadhá 'lîlma makhs'ús'on' bimá
kad ſháâa feíhi índa culli 'lûlemá
waánna zaídán' khus's'a lá mahhálah
bimá hhabáho s'áhhibo 'lriſálah
min kaúlihi feí fadh'lihi monabbehá

áfradh'acom zaídon wanáheíca behá
facána áúlaí be-íttibáî 'ltábiî
lá ſiyyamá wakad nahháho 'lſháfiêí
faháca feíhi álkaúla bi'leíjázi
mobarraán' min kas'mah'i 'lálgázi
áſbábo meíráthi 'lwaraí theláthah
cullon yofeído rabbaho 'lwiráthah
wahaí nicáhhon' waweláon' wanaſab
má bâdahonna lilmawáreíthi ſabab.

[2]

wayamnaô 'lſhakhs'a min álmeíráthi
wáhhidah'on' min îlalin' theláthi
rikkon' wakatlon' waákhtiláfo deíni
faáfham falaíſa 'lſhacco cályakeíni
wálwárithúno feí 'lrijáli âſharah
áſmáwahom mârúfah'on' muſhtaharah
álíbno wa'bno 'líbni mahmá nazalá
wa'lábo wa'ljeddo leho waï'n âlá
wálákho min áyyi 'ljeháti cáná
kad ánzela 'llaho bihi 'lkoráná
wábno 'lákhi 'lmodleí ílaíhi bi'lábi
faſmâ mekálán' laíſa bi'lmucadhdhabi
wa' lâmmo wábno 'lâmmi min ábeíhi
fáſhcor ledheí 'leíjázi wáltanbeíhi.
wálzaújo wálmôtiko dhú 'lwelái
ſajumlah'o 'ldhucúri hawolái
wálwáritháto cullohinna ſebô
lam yâth'i ónthei gaírahonna 'lſherô

binton' wabinto 'bnin' waómmon' muſhfikah
wajaddah'on' wazaújah'on' wamôtikah
wálákhto min áyyi 'ljeháti cánat
fahadhihi îddatohá kad bánat
wáâlam biánna 'lírtha naúâáni homá
fardh'on' watâs'eíbon' âlaí ma koſimá
fálfardho feí nas's'i 'lcitábi ſittah
lá fardh'o feí 'lírthi ſiwáhá bittah
nis'fon' warubôn' thomma nis'fo 'lrubî
wálthultho wálſudſo binas's'i 'lſherî
wálthultháni wahomá áltemámo
fáhhfadh" facullo hháfidh"in' imámo

[3]

fálnis'fo fardh'o khamſáhîn' áfrádî
álzaújo wálónthaí min áláúládi
wabinto 'líbni înda fakdi 'lbinti
wálákhto feí medh-hebi culli mufteí
wabâdahá 'lákhto 'llati min álábi
înda ánfirádihinna min moâs's'ibi
wálrubô fardh'a 'lzaúji ín cána maâh
min waladi 'lzaújah'i men kad menaâh
wahú leculli zaújah'in' áú áctherá
mâ âdami 'láúladi feîmá kadderá
wálthomno lilzaújah'i wálzaújáti
má âlbeneína áú mâ álbenáti
áú mâa áúládi 'lbeneíni fáâlemeî
wábek le-ítkári 'ldurúſi wáſlemeí
waálthúltháni lilbenáti jemâá

má záda ân wáhhidah'ì fafemâá
wahúa cadháca lebenáti 'líbni
fáfham mekáleí fahma s'áfeí 'ldhihni
wahúa liákhtaíni femá yezeído
kadh'aí bihi 'láhhráro wálâbeído
hadhá ídhá cunna liómmi waábi
áú liábi fáâmel bihadhá tos'ibi
wálthultho fardh'o 'lómmi hhaítho lá weled
wela mina 'lákhwah'ì jemô waâded
cáthnaíni áú thintaíni áú theláthi
hocmo 'ldhucúri feíhi cálínáthi
waï'n yecun zaújon' waómon' waábo
fathultho 'lbákíyo lehá morattabo
wahacadhai mâ zaújah'in' fas'áîdá
felá tecun mina 'lûlúmi káîdá

[4]

wálthultho liláthnaíni áú thintaíni
min weledi 'lómmi bigaíri maíni
wahacadhaí ín catharúá farádúá
fema lehom feímá ſiwáho zádo
wataſtawaí 'línátho wáldhucúro
feíhi camá kad áúdh'ahho 'lmeſth'úro
wálſudſo fardh'o ſebâh'in' mina 'lâded
ábon' waómmon' thomma binto'bni wajedd
wálókhto binto 'lábi thomma 'ljeddah
waweledo 'lómmi temámo 'lîddah
fálábo yeſtahhikkoho mâa 'lweled
wahacadhaí 'lómmo betenzeíli 'ls'emed

wahú lehá áydh'án' mâa 'láthnaíni
min íkhwah'i 'lmaíti fakis hadhaíni
wáljeddo mithlo 'lábi înda fakdihi
feí jeza má yes'eíboho wameddihi
íllá ídhá cána honáca íkhwah
licaúnahom feí 'lkurbi wahú áſwah
wahhucmohim wahhucmoho ſeyáteí
mocammela 'lbayána feí 'lhháláti
wabinto 'líbni tákhodh álſudſa ídhá
cánat mâá 'lbinti mithálá yahhtadhaí
wahacadhaí 'lókhto mâa 'lókhti 'llataí
biálábawaíni yá ókhayyo ádlata
faï'n teſáwaí neſebo 'ljeddáti
wacunna cullahonna wáritháti
fálſudſo bainahonna biálſawiyyah
feí 'lkiſmah'i 'lâádilah'i 'lſherîyyah
wacullo men ádlat bigaíri wárithi
femá lehá hhadh"dh"on' mina 'lmawárithi.

[5]

wataſkotho 'lbôdaí bidháti 'lkurbi
feí 'lmedh-hebi 'láúlaí fakol leí hhaſbeí
wakad tenáhat kiſmah'o 'lforúdh'i
bigaíri íſhcáli welá gomúdh'i
wahhokka án neſhraâ feí 'ltâs'eíbi
biculli kaúlin' mújizin' mus'eíbi
facullo men áhhraza culla 'lmáli
mina 'lkarábáti áú álmawáleí
áú cána má yafdh'olo bâda 'lfardh'i leh
fahú ákhú 'lâs'úbah'i 'lmofadh'dh'aleh

cálábi wáljeddi wajeddi 'ljeddi
wálíbni índa kurbihi wálbôdi
wálákhi wábni 'lákhi wáláâmámi
wálſayyidi 'lmôtiki dheí 'líṇâ̈ámi
wahacadhaí benúohom jemeíâán'
facun lemá ádhcoroho ſemeíâán'
wamá ledheí 'lbôdi mâa 'lkareíbi
feí 'lírthi min hhadh"dh"in' wela nes'eíbi
wálákho wálâmmo liómmin' waábi
áúlaí mina 'lmodleí biſhath'ri 'lnaſabi
wa'líbno wálákho mâa 'línáthi
yoâs's'ibánahinna feí 'lmeíráthi
walaíſa feí 'lniſâï th'urrán' âs'abah
íllá 'llataí mennat bi îtki 'lrakabah
wálákhawáto ín yecun benáto
fahonna bâdahonna âs'abáto
wa'ljeddo mahhjúbon' âni 'lmeíráthi
bi'lábi feí áhhwálihi 'ltheláthi
wahacadhaí 'bno 'líbni bi'líbni felá
tabig âni 'lhhacmi 'lſáhheíhhi mâdilá

[6]

wataſkoth'o 'ljeddáto min culli jiheh
bi 'lómmi fáhhfadh"-ho wakis má áſhbeheh
wataſkoth'o 'líkhwah'o bi'lbeneíná
wabi'lábi 'ládnaí camá ruweíná
áú bibeneí 'lbeneína hhaítho cánúá
ſiyyáni feíhi 'ljemâ wa'lwahhdáno
wayafdh'olo'bno 'lómmi bi'líſkáth'i
bi'ljeddi fáhhfadh"-ho âlaí íhhtiyáth'i

wabi 'lbenáti wabenáti 'líbni
facun bihhifdh"i 'lîlmi jiddán' mônei
thomma benáto 'líbni yeſkoth'na metai
hháza 'lbenáto álthulthaína yá fetaí
íllá ídhá âs's'abahonna áldhacaro
min welidi 'líbni âlaí má dhacarúá
wabâdahonna 'lákhawáto 'llátaí
yodleína bi'lkurbi min áljiháti
ídhá ákhádna fardh'áhonna wáfiyá
áſkath'na áúláda 'lábi 'lbawáciyá
waï'n yecun ákho lehonna hhádh'irán'
áâs'abahonna bathínán' wadh"ahirán'
walaíſa íbno'lákhi bi'lmoâs's'abi
men mithlaho áú faúkaho feí 'lnaſabi
waï'n tajid zaújan' waómmán' wárithá
waïkhwah'an' lilómmi hházúá 'lthulothá
waákhwah'an' áydh'án' liómmi waábi
waáſtugrika 'lmálo bifardh'i 'lnos'obi
fájâlahomo cullohomo liómmi
waáhhſib ábáhom hhajarán' feí 'lyammi
wákſim âlaí 'líkhwah'i thultha 'ltaricah
wahadhihi 'lmeſelah'o 'lmuſhtaracah

[7]

wálána nebdá bi'lladhaí áradná
feí 'ljeddi wa'líkhwah'i ídh waâdná
faálik nahhaú má ákúlo 'lmiſmaâá
wájmâ hhawáſheí 'lcelamáti ájmaâá
wáâlem biánna 'ljeddo dhú áhhwáli

ónbeíca ânhonna âlaí 'ltawáleí
fakáſimo 'líkhwah'i feíhonna ídhâ
lam yaôdi 'lkaſmo âlaíhi bi'ládhai
fatárah'an' yákhodho thulthán' cámilán'
ín cána bi'lkiſmah'i ânho názilán'
ín lam yecun feíhim dhawú ſihámi
fáknâ biáydh'áhheí âni íſtif'hámi
watárah'an' yakhodho thultha 'lbákeí
bâda dhaweí 'lforúdh'i wa'lárzáki
hadhá ídhá má ádh'-hhati 'lmokáſamah
tenkos'ho âni dhâci bi'lmezáhhamah
watárah'an' yákhodho ſudſa 'lmáli
walaíſa ânho názilán' bihhâli
wahaú mâa 'línáthi índa 'lkaſmi
mithlo ákhin' feí ſahmihi wa'lhhocmi
wáhhſeb beneí 'lábi ledaí 'lídádi
wárfodh' beneí 'lómmi mâa 'lájdádi
wáhhcom âlaí 'líkhwah'i bâda 'lâddi
hhocmaca feíhim índa fakdi 'ljeddi
wálókhto lá fardh'o mâa 'ljeddi lehá
feíma âlá meſelah'an' cammalehá
zaújon' waómmon' wahomá temámohá
fáâlem fakhaíro ómmah in âllámohá
tôrafo yá s'áhhi bi'lácdariyyah
waheí bián tahhfadh'o-há hhariyyah

[5]

fayofradh'o 'lnis'ío lehá wa'lſudſo leh
hhataí tâúli bi'lforúdh'i 'lmojmeleh
thomma yaûúdáni ílaí 'lmokáſameh

tamá madh'aí fáhhfadh"-ho wáſheor nádh"imeh
wai"n torid mârifah'a 'lhhiſábi
letentahaí feihi ílaí 'ls'awábi
watârifo 'lkiſmah'a wa'ltafs'eílá
watâlim áls'ahheíhha wa'lós'úlá
fáſtakhriji 'lós'úla feí 'lmeſáyili
walá tecun ân hhifdh"ihá bidháhili
wahaí ídhá fos's'ila feíhá 'lkaúlo
thelethah'on' yedkholo feíhá 'lâúlo
wabâdahá árbaâh'on' temámo
lá âúla yârúhá welá ínthilámo
fálſudſo min ſittah'i ás-homin' terá
wálthultho wa'lrubô min áthnaí âſhará
wálthumno ín dh'omma ílaíhi 'lſudſo
faás'loho 'ls'ádiko feíhi 'lhhadſo
árbaâh'on' yatbaôhá îſhrúná
yârifohá 'lhhuſábo ájmaûúná
fahadhihi 'lthelethah'o 'lós'úlo
ín caththorat forúdh'ohá taûúlo
fatablogo 'lſittah'o âkda 'lâſhareh
feí s'úrah'in' mârúfah'in' muſtath'areh
watalhhako 'llataí teleíhá fei 'láthar
feí 'lâúli áfrádán' beſebâh'i âſhar
wa'lâdado 'lthálitho kad yaûúlo
bithumnihi fáâmel bimá ákûlo
wa'lnis'fo wa'lbakeí áwi'lnis'fáni
ás'lohomá feí hucmihom áthnáni

[9]

wa'lthulʃtho min thelethah'in' yecúno
wa'lrubô min árbaâh'in' meſnúno
wa'lthumno ín cána famin themániyah
fahadhihi haí 'lós'úlo 'lthániyah
lá yedkholo 'lâúlo alaíhá fáâlemi
thomma áſloca 'ltás'-hheíhi feíhá wákſimi
faï'n tecun min ás'lihá tas'ihhhho
fatarco tath'weíli 'lhhiſábi ribhho
fáâth'i cullán' ſahmaho min ás'lhi
mocammilán' aú âáyilán' min âúlihi
waï'n teraí 'lſiháma laíſa tankaſim
âlaí dhaweí 'lmeíráthi fátbâ má ruſim
wáthlob th'areíka 'líkhtis'árí feí 'lâmal
bi'ldh'arbi wa'lwafki yojánibca 'lzelel
wárdod ílaí 'lwafki 'lladhaí yowáfiko
wádh'ribho feí 'lás'li waánta 'lhhádiko
ín cána jinſán' wáhhidán' áú áctherá
fahhfadh" wadâ ánca 'ljidála wa'lmirá
waï'n teraí 'lcathra âlaí ájnáſi
faï'nnahá feí 'lhucmi înda 'lnáſí
tohhs'aro feí árbaâh'in' ákſámi
yârifohá 'lmáhiro feí 'láhhcámí
momáthiłon' min bâdiho monáſibo
wabâdaho mowáfikon' mos'ahhibo
wa'lrábiô 'lmobáyino 'lmokhálifo
yonbeíca ân tafs'eílihinna 'lâárifo
fakhodh mina 'lmomáthilaíni wáhhidá

wakhodh mina 'lmonáſibaíni 'lzáyidá
wakhodh jemeſâ 'lâdadi 'lmobáyini
wadh'ribho feí 'lthánei welá todáhini

[10]

wádh'rib jemeſâ 'lwafki feí 'lmowáfiki
wáſloc bidháca ánhaja 'lth'aráyiki
wádh'ribho feí 'lás'li 'lladhaí taás's'ilá
waáhhs'i má ándh'amma wamá tahhas's'alá
waákſimho fa'lkaſma ídhá s'ahheíhho
yârifoho 'láâjemo wa'lfas'eíhho
fahadhihi mina 'lhhiſábi jumalo
yáteí âlaí mithálihinna 'lâmalo
min gaíri tath'weílin' welá 'âtiſáfi
fáknâ bimá feíhinna fahú cáfi
waï'n yemut ákharo kabla 'lkiſmah
fahhakkiki 'lſihámi wáârif kiſmah
wájâl leho meſalah'an' ókhraí lemá
kad bayyana 'ltafs'eíla feímá koddimá
wándh"or faï'n wáfakati 'lſihámo
fakhodh hodeíta wafkohá temámo
wádh'ribho áú jemeíâhá feí 'lſábikah
ín lam yecun baínahomá mowáfakah
fálás-homo 'lókhraí fafeí 'lſihámi
todh'rebo áú feí wafkihá temámi
wacullo fahm[illegible]hániyah
yodh'rebo [illegible]iyáh
fah[illegible]

waï'n yecun feí'muſtahhakki 'lmáli
khonthaín' s'ahheílihon bayyana 'líſhcáli
fákſim âlaí'lákalli wa'lyekeíni
tahhdh''a bihakki 'lkiſmah'i 'lmobeíni
wahacadhaí hucmo dhawáti 'lhhamli
yobnaí âlaí 'lyekeíni wa'lákalli

[11]

waï'n yemut kaúmon' bihadmin' áú garak
áú hhádithin' âmma 'ljemeíâ ca'lhharak
walam yecun yôlemo hhálo 'lſábiki
falá yowarrath náfikon' min náfiki
taôddohom caï'nnahom ájánibo
wahacadhaí 'lráyyo 'lſadeído 'ls'áyibo
wakad átaí 'lkaúlo: âlaí má ſheíná
min kiſmah'i 'lmeíráthi ca yebeíná
âlaí th'areíki 'lramzi wa'líſhárah
molakhkhas'án' biáújezi 'lîbárah
fa'lhhámdo lillahi âlaí 'ltemámi
hhamdán' catheírán' tomma feí 'ldawámi
wanaſalo 'lâfwa âni 'ltaks'eíri
wakhaíra má námolo feí 'lmes'eíri
wagafra má cána mina 'ldhonúbi
waſatra má cána mina 'lôyúbi
waáfdh'alo 'ls'alwah'i wa'ltaſleími
âlaí 'lnebiyyi 'lmus'th'afaí 'lcereími
mohhammedín' khaíri 'lánámi 'lâákibi
waálihi 'lgurri dhaweí 'lmenákibi
was'ahhbihi 'láfádh'ili 'lábrári

álsʻifwahʻi 'lámáthili 'lákhyári
wahhaſboná 'llaho wanîma 'lcáfeí
dhú 'lîzzi wa'lkodrahʻi wa'lálthʻáfi

tummat wa'lhhamdo lillahi
rabbi 'lâálemeíni wasʻalwátoho
waſelámoho âlaí ſayyidiná
mohhammedinʻ álnebiyyi 'lómmiyi
waâlaí álihi wasʻahhbihi
álthʻayyibeíni álthʻahereíni
laílahʻo 'ljemaâh liárbaâi liyáli
khalaúna min ſhewáli ſinnah
áthneí âſhari waſebâ máyihʻi
yetheki bi'llahi taâálaí
fakhro 'lſábikáneí
âfá 'llaho ânho.

بغية الباحث عن جمل المواريث
نظم الشيخ الإمام العالم موفق الدين
أبي عبد الله محمد بن علي بن الحسين الرحبي المعروف
بابن المتقنة رحمه الله تعالى

This & Plates 1,2,3,4,5,6,7,8,9,10,11, to follow each other in Vol 6, page 26

بسم الله الرحمن الرحيم وبه نستعين

أول ما تستفتح المقالا بذكر حمد ربنا تعالا

فالحمد لله على ما أنعما حمدا به تجلوا عن العين العما

ثم الصلوة بعد والسلام على نبي دينه الإسلام

محمد خاتم رسل ربه وآله من بعده وصحبه

ونسأل الله لنا الإعانة فيما توخينا من الإبانة

عن مذهب الإمام زيد الفرضي إذ كان ذاك من أهم الغرض

علما بأن العلم أوفى ما سعى فيه وأولى ما له العبد دعى

وأن هذا العلم مخصوص بما قد شاع فيه عند كل العلما

وأن زيدا خص لا محالة بما حباه صاحب الرسالة

من قوله في فضله منبها أفرضكم زيد وناهيك بها

فكان أولى باتباع التابع لا سيما وقد نحاه الشافعي

فهاك فيه القول بالإيجاز مبرأ من وصمة الألغاز

أسباب ميراث الورى ثلاثة كل يفيد ربه الوراثة

وهي نكاح وولاء ونسب ما بعدهن للمواريث مسبب

٢

وَيَمْنَعُ الشَّخْصَ مِنَ الْمِيرَاثِ وَاحِدَةٌ مِنْ عِلَلٍ ثَلَاثٍ
رِقٌّ وَقَتْلٌ وَاخْتِلَافُ دِينٍ فَاعْلَمْ فَلَيْسَ الشَّكُّ كَالْيَقِينِ
وَالْوَارِثُونَ مِنَ الرِّجَالِ عَشَرَهْ أَسْمَاؤُهُمْ مَعْرُوفَةٌ مُشْتَهِرَهْ
الِابْنُ وَابْنُ الِابْنِ مَهْمَا نَزَلَا وَالْأَبُ وَالْجَدُّ لَهُ وَإِنْ عَلَا
وَالْأَخُ مِنْ أَيِّ الْجِهَاتِ كَانَا كَمَا قَدْ أَنْزَلَ اللَّهُ بِهِ الْقُرْآنَا
وَابْنُ الْأَخِ الْمُدْلِي إِلَيْهِ بِالْأَبِ فَاسْمَعْ مَقَالًا لَيْسَ بِالْمُكَذَّبِ
وَالْعَمُّ وَابْنُ الْعَمِّ مِنْ أَيِّهِ فَاشْكُرْ لِذِي الْإِعَازِ وَالتَّنْبِيهِ
وَالزَّوْجُ وَالْمُعْتِقُ ذُو الْوَلَاءِ فَجُمْلَةُ الذُّكُورِ هُمْ هَؤُلَاءِ
وَالْوَارِثَاتُ كُلُّهُنَّ سَبْعٌ لَمْ يُعْطَ أُنْثَى غَيْرُهُنَّ الشَّرْعُ
بِنْتٌ وَبِنْتُ الِابْنِ مَهْمَا سَفَلَهْ وَجَدَّةٌ وَزَوْجَةٌ وَمُعْتِقَهْ
وَالْأُخْتُ مِنْ أَيِّ الْجِهَاتِ كَانَتْ فَهَذِهِ عِدَّتُهَا قَدْ بَانَتْ
وَاعْلَمْ بِأَنَّ الْإِرْثَ نَوْعَانِ هُمَا فَرْضٌ وَتَعْصِيبٌ عَلَى مَا قُسِمَا
فَالْفَرْضُ فِي نَصِّ الْكِتَابِ بَيِّنَهْ لَا فَرْضَ فِي الْإِرْثِ سِوَاهَا بَيِّنَهْ
نِصْفٌ وَرُبْعٌ ثُمَّ نِصْفُ الرُّبْعِ وَالثُّلُثُ وَالسُّدُسُ بِنَصِّ الشَّرْعِ
وَالثُّلُثَانِ وَهُمَا التَّمَامُ فَاحْفَظْ وَكُلُّ حَافِظٍ إِمَامُ

فالنصف فرض خمسة افراد الزوج والابنت من الاولاد
وبنت الابن عند فقد البنت والاخت في مذهب كل مفتى
وبعدها الاخت التي من الاب عند انفرادهن من مقصب
والربع فرض الزوج اذا كان معه من ولد الزوجة من قد منعه
وهو لكل زوجة او اكثر مع عدم الاولاد فيما قدرا
والثمن للزوجة والزوجات مع البنين ومع البنات
او مع اولاد البنين فاعلمن وابق لاتقاب الدروس واسلمن
والثلثان للبنات جمعا ما ذا دعن واحدة فسمعا
وهو كذا كل لبنات الابن فانهن مقابل لهن صافي الذهن
وهو لاختين فما بزيد قضى به الاحرار والعبيد
هذا اذا كن لام واب او لاب فاعمل بهذا تصب
والثلث فرض الام حيث لا ولد ولا من الاخوة جمع وعده
كاثنين او ثنتين او بلا شرط حكم الذكور فيه كالاناث
وان تكن زوج وام واب فثلث الباقي لها مرتب
وهكذى مع زوجة نصا عدا فلا تكن من العلوم قاعدا

والثلث للاثنين او ثنتين من ولد الام بغير مين
وهكذي ان كثروا فزادوا فما لهم فيما سواه زاد
وتستوي الاناث والذكور فيه كما قد اوضح المسطور
والسدس فرض سبعة من العدد اب وام ثم بنت ابن وجد
والاخت بنت الاب ثم الجدة وولد الام تمام العدة
والاب يستحقه مع الولد وهكذي الام بتنزيل الصمد
وهو لها ايضا مع الاثنين من اخوة الميت فقس هذين
والجد مثل الاب عند فقده في جزء ما يصيبه ومده
الا اذا كان هناك اخوة لكونهم في القرب وهو اسوة
وحكمهم وحكمه سياتي مكمل البيان في الحالات
وبنت الابن تاخذ السدس اذا كانت مع البنت مثالا يحتذى
وهكذي الاخت مع الاخت التي بالابوين يا اخي ادلت
فان تساوى نسب الجدات وكن كلهن وارثات
فالسدس بينهن بالسوية في القسمة العادلة الشرعية
وكل من ادلت بغير وارث فما لها حظ من المواريث

وتسقط البعدى بذات القرب في المذهب الاولى فقل لي حسبي
وقد تناهت قسمة الفروض بغير اشكال ولا غموض
وحق ان نشرع في التعصيب بكل قول موجز مصيب
فكل من احرز كل المال من القرابات او الموالي
او كان ما يفضل بعد الفرض له فهو اخو العصوبة المفضله
كالاب والجد وجد الجد والابن عند قربه والبعد
والاخ وابن الاخ والاعمام والسيد المعتق ذي الانعام
وهكذي بنوهم جميعا فكن لما اذكر سميعا
وما لذي البعد مع القريب في الارث من حظ ولا نصيب
والاخ والعم لام واب اولى من المدلي لشطر النسب
والابن والاخ مع الاناث يعصبانهن في الميراث
وليس في النساء طرا عصبة الا التي منت بعتق الرقبة
والاخوات ان يكن بنات فهن بعدهن عصبات
والجد محجوب عن الميراث بالاب في احواله الثلاث
وهكذي ابن الابن بالابن فلا تبغ عن الحكم الصحيح معدلا

وتسقط الجدات من كل جهة بالام فاحفظه وقس ما اشبهه
وتسقط الاخوة بالبنين وبالاب الادنى كما رويت
او بني البنين حيث كانوا سيتان فيه الجمع والوجدان
وتفضل ابن الام بالاسقاط بالجد فاحفظه على احتياط
وبابنات وبنات الابن فكن بحفظ العلم جدا اعني
ثم بنات لابن يسقطن متى حاز البنات الثلثين بانى
الا اذا عصبهن الذكر من ولد الابن على ما ذكروا
وبعدهن الاخوات اللاتي يدلين بالقرب من الجهات
اذا اخذن فرضهن وافيا اسقطن اولاد الاب النوائبا
وان يكن اخ لهن حاضرا عصبهن باطنا وظاهرا
وليس ابن الاخ بالمعصب من مثله او فوقه في النسب
وان يجد زوجا وامنا واختا او اخوة للام جاز والثلثا
واخوة ايضا لام واب واستغرق المال بفرض النصب
فاجعلهم كلهم لام واحسب اباهم جدا في القسم
واقسم على الاخوة ثلث التركة وهذه المسئلة المشتركة

بغية الباحث عن جمل المواريث
نظم الشيخ الإمام العالم موفق الدين
أبي عبد الله محمد بن علي بن الحسين الرحبي المعروف
بابن المتقنة رحمه الله تعالى

This & Plates 1,2,3,4,5,6,7,8,9,10,11, to follow each other in Vol 6, page 26

بسم الله الرحمن الرحيم وبه نستعين

أول ما نستفتح المقالا بذكر حمد ربنا تعالا

فالحمد لله على ما أنعما حمدا به تجلوا عن العين العما

ثم الصلوة بعد والسلام على نبي دينه الإسلام

محمد خاتم رسل ربه وآله من بعده وصحبه

ونسأل الله لنا الإعانة فيما توخينا من الإبانة

عن مذهب الإمام زيد الفرضي إذ كان ذاك من أهم الغرض

علما بأن العلم أوفى ما سعى فيه وأولى ما له العبد دعى

وأن هذا العلم مخصوص بما قد شاع فيه عند كل العلما

وأن زيدا خص لا محالة بما حباه صاحب الرسالة

من قوله في فضله منبها أفرضكم زيد وناهيك بها

فكان أولى باتباع التابع لا سيما وقد نحاه الشافعي

فهاك فيه القول بالإيجاز مبرأ من وصمة الألغاز

أسباب ميراث الورى ثلاثة كل يفيد ربه الوراثة

وهي نكاح وولاء ونسب ما بعدهن للمواريث مسبب

١

وَيَمْنَعُ الشَّخْصَ مِنَ الْمِيرَاثِ وَاحِدَةٌ مِنْ عِلَلٍ ثَلَاثٍ
رِقٌّ وَقَتْلٌ وَاخْتِلَافُ دِينٍ فَاعْلَمْ فَلَيْسَ الشَّكُّ كَالْيَقِينِ
وَالْوَارِثُونَ مِنَ الرِّجَالِ عَشَرَهْ أَسْمَاؤُهُمْ مَعْرُوفَةٌ مُشْتَهِرَهْ
الِابْنُ وَابْنُ الِابْنِ مَهْمَا نَزَلَا وَالْأَبُ وَالْجَدُّ وَإِنْ عَلَا
وَالْأَخُ مِنْ أَيِّ الْجِهَاتِ كَانَا كَذَا أَنْزَلَ اللَّهُ بِهِ الْقُرْآنَا
وَابْنُ الْأَخِ الْمُدْلِي إِلَيْهِ بِالْأَبِ فَاسْمَعْ مَقَالًا لَيْسَ بِالْمُكَذَّبِ
وَالْعَمُّ وَابْنُ الْعَمِّ مِنْ أَبِيهِ فَاشْكُرْ لِذِي الْإِعْزَازِ وَالتَّنْبِيهِ
وَالزَّوْجُ وَالْمُعْتِقُ ذُو الْوَلَاءِ جُمْلَةُ الذُّكُورِ هُمْ لَا
وَالْوَارِثَاتُ كُلُّهُنَّ سَبْعٌ لَمْ يُعْطَ أُنْثَى غَيْرُهُنَّ شَرْعُ
بِنْتٌ وَبِنْتُ ابْنٍ وَأُمٌّ مُشْفِقَهْ وَجَدَّةٌ وَزَوْجَةٌ وَمُعْتِقَهْ
وَالْأُخْتُ مِنْ أَيِّ الْجِهَاتِ كَانَتْ فَهَذِهِ عِدَّتُهَا قَدْ بَانَتْ
وَاعْلَمْ بِأَنَّ الْإِرْثَ نَوْعَانِ هُمَا فَرْضٌ وَتَعْصِيبٌ عَلَى مَا قُسِمَا
فَالْفَرْضُ فِي نَصِّ الْكِتَابِ سِتَّهْ لَا فَرْضَ فِي الْإِرْثِ سِوَاهَا بَتَّهْ
نِصْفٌ وَرُبْعٌ ثُمَّ نِصْفُ الرُّبْعِ وَالثُّلُثُ وَالسُّدُسُ بِنَصِّ الشَّرْعِ
وَالثُّلُثَانِ وَهُمَا التَّمَامُ فَاحْفَظْ فَكُلُّ حَافِظٍ إِمَامُ

فالنصف فرض خمسة افراد الزوج والاخت من الاولاد
وبنت الابن عند فقد البنت والاخت في مذهب كل مفتى
وبعدها الاخت التي من الاب عند انفرادهن من مصب
والربع فرض الزوج اذا كان معه من ولد الزوجة من قد منعه
وهو لكل زوجة او اكثر مع عدم الولد فيما قدرا
والثمن للزوجة والزوجات مع البنين ومع البنات
او مع اولاد البنين فاعلمن وابن لاقتاب الدروس واسلمن
والثلثان للبنات جمعا ما ذا دعن واحدة فسمعا
وهو كذا كل لبنات الابن فافهم مقالي فهو صاف في الذهن
وهو لاختين فما يزيد فضى به الاحرار والعبيد
هذا اذا كن لام وأب او لاب فاعمل بهذا تصب
والثلث فرض الام حيث لا ولد ولا من الاخوة جمع وعده
كاثنين او ثنتين او بلا حكم الذكور فيه كالاناث
وان تكن زوج وام واب فثلث الباقي لها مرتب
وهكذى مع زوجة فصاعدا فلا تكن من العلوم قاعدا

والثلث للاثنين او ثنتين من ولد الام بغير مين
وهكذي ان كثروا فزادوا فما لهم فيما سواه زاد
وتستوي الاناث والذكور فيه كما قد اوضح المسطور
والسدس فرض سبعة من العدد اب وام ثم بنت ابن وجد
والاخت بنت الاب ثم الجدة وولد الام تمام العدة
فالاب يستحقه مع الولد وهكذي الام بتنزيل الصمد
وهو لها ايضا مع الاثنين من اخوة الميت فقس هذين
والجد مثل الاب عند فقده في جزء ما يصيبه ومده
الا اذا كان هناك اخوة لكونهم في القرب وهو اسوة
وحكمهم وحكمه سياتي مكمل البيان في الحالات
وبنت الابن تاخذ السدس اذا كانت مع البنت مثالا يحتذى
وهكذي الاخت مع الاخت التي بالابوين يا اخي ادلت
فان تساوى نسب الجدات وكن كلهن وارثات
فالسدس بينهن بالسوية في القسمة العادلة الشرعية
وكل من ادلت بغير وارث فما لها حظ من الموارث

٥

وتسقط البعدى بذات القرب في المذهب الاولى فقل لي حسبي
وقد تناهت قسمة الفروض بغير اشكال ولا غموض
وحق ان نشرع في التعصيب بكل قول موجز مصيب
فكل من احرز كل المال من القرابات او الموالي
او كان ما يفضل بعد الفرض له فهو اخو العصوبة المفضله
كالاب والجد وجد الجد والابن عند قربه والبعد
والاخ وابن الاخ والاعمام والسيد المعتق ذي الانعام
وهكذي بنوهم جميعا فكن لما اذكر سميعا
وما لذي البعد مع القريب في الارث من حظ ولا نصيب
والاخ والعم لام واب اولى من المدلي لشطر النسب
والابن والاخ مع الاناث يعصبانهن في الميراث
وليس في النساء طرا عصبة الا التي منت بعتق الرقبة
والاخوات ان يكن بنات فهن بعدهن عصبات
والجد محجوب عن الميراث بالاب في احواله الثلاث
وهكذي ابن الابن بالابن فلا تبغ عن الحكم الصحيح معدلا

وتسقط الجدات من كل جهة بالام فاحفظه وقس ما اشبهه
وتسقط الاخوة بالبنين وبالاب الادنى كما رويت
او بني البنين حيث كانوا سيان فيه الجمع والوحدان
وتفضل الام بالاسقاط فالحد فاحفظه على احتياط
وبالبنات وبنات الابن فكن بحفظ العلم جدا معتني
ثم بنات الابن يسقطن متى حاز البنات الثلثين بانى
الا اذا عصبهن الذكر من ولد الابن على ما ذكروا
وبعدهن الاخوات اللاتي يدلين بالقرب من الجهات
اذا اخذن فرضهن واعيا اسقطن اولاد الاب البواكيا
وان يكن اخ لهن حاضرا عصبهن باطنا وظاهرا
ولبنى ابن الاخ بالمعصب من مثله او فوقه في النسب
وان يجد زوجا وامنا واخوة للام جاز والثلثا
واخوة ايضا لام واب واستغرق المال بفرض النصب
فاجعلهم كلهم لام واحسب اباهم جدا في القسم
واقسم على الاخوة ثلث التركة وهذه المسئلة المشتركة

والآن نبدأ بالذي أردنا في الجد والأخوة إذ وعدنا
فالو نحو ما أقول المسمعا واجمع جوابي الكلمات أجمعا
واعلم بأن الجد ذو أحوال أنبيك عنهن على التوالي
مقاسم الأخوة فيهن إذا لم يبعد القسم عليه بالأدى
فتارة يأخذ ثلث كاملا إن كان بالقسمة عنه نازلا
إن لم يكن فيهم ذو وسهام فاقنع بإيضاحي عن استفهام
وتارة يأخذ ثلث الباقي بعد ذوي الفروض والأزواف
هذا إذا ما أصبحت المقاسمة تنقصه عن ذاك بالمزاحمه
وتارة يأخذ سدس المال ولم ينزل عنه نازل بحال
وقوع الإناث عند القسم مثل إخوة وسهمه والحكم
واحسب بني الإناث لدى العدد وارفض بني الأم مع الأجداد
واحكم بما الأخوة بعد العد حكمك فيهم عند فقد الجد
والأخت لا فرض مع الجد لها فيما عدا مسئلة كملها
زوج وأم وهما تمامها فاعلم فخير أمة علامها
تعرف يا صاح بالاكدر به وهي بأن تحفظها حديثه

فيفرض النصف لها والسدس له حتى تقول بالفروض المجملة
ثم يعودان إلى المقاسمة كما مضى فاحفظه واشكر فاعلمه
وإن ترد معرفة الحساب لتنتهي فيه إلى الصواب
وتعرف القسمة والتفصيلا وتعلم الصحيح والأصولا
فاستخرج الأصول في المسائل ولا تكن عن حفظها بذاهل
وهي إذا فصل فيها القول ثلثة يدخل فيها العول
وبعدها أربعة تمام لا عول يعروها ولا انثلام
فالسدس من ستة أسهم توا والثلث والربع من اثني عشرا
والثمن إن ضم إليه السدس فأصله الصادق فيه الحدس
أربعة يتبعها عشرونا يعرفها الحساب أجمعونا
فهذه الثلثة الأصول إن كثرت فروضها تعول
فتبلغ الستة عقد العشرة في صورة معروفة مستطرة
وتلحق التي تليها في الأثر في العول أفرادا بسبعة عشر
والعدد الثالث قد يعول بثمنه فاعمل بما أقول
والنصف والباقي أو النصفان أصلهما في حكمهم اثنان

والثلث من ثلثة يكون والربع من اربعة مسنون
والثمن ان كان فمن ثمانية فهذه هي الاصول الثانية
لا يدخل العول عليها فاعلم ثم اسلك التصحيح فيها واقسم
فان تكن من اصلها تصح فترك تطويل الحساب ربح
فاعط كلا سهمه من اصله مكملا او عائلا من عوله
وان ترى السهام ليس تنقسم على ذوي الميراث فاتبع فارسم
واطلب طريق الاختصار في العمل بالضرب والوفق يجانبك الزلل
واردد الى الوفق الذي يوافق واضربه في الاصل وانت الحاذق
ان كان جنسا واحدا او اكثرا فاحفظ ودع عنك الجدال والمرا
وان ترى الكسر على اجناس فانها في الحكم عند الناس
تحصر في اربعة اقسام يعرفها الماهر في الاحكام
مماثل من بعده مناسب وبعده موافق مصاحب
والربع المباين المخالف ينبيك عن تفصيلهن العاف
فخذ من المماثلين واحدا وخذ من المناسبين الزائدا
وخذ جميع العدد المباين واضربه في الثاني ولا تداهن

واضرب جميع الوفق في الموافق واسلك بذاك انهج الطرائق
واضربه في الاصل الذي تاصلا واحص ما انضم وما تحصلا
واقسمه فالقسم اذا صحيح يعرفه الاعجم والفصيح
فهذه من الحساب جمل ياتي على مثالهن العمل
من غير تطويل ولا اعتساف فاقنع بما فيهن فهو كاف
وان يمت آخر قبل القسمة فحقق السهام واعرف قسمة
واجعل له مسالة اخرى لما قد بين التفصيل فيما قدما
وانظر فان وافقت السهام فخذ هديت وفقها تمام
واضربه او جميعها في السابقة ان لم يكن بينهما موافقة
فالاسهم الاخرى ففي السهام تضرب او في وفقها تمام
وكل سهم في جميع الثانية يضرب او في وفقها علانية
فهذه طريقة المناسخة فارق بها رتبة فضل شامخة
وان يكن في منتحى المال خنثى صحيح بين الاشكال
فاقسم على الاقل واليقين تحظ بحق القسمة المبين
وهكذا حكم ذوات الحمل يبنى على اليقين والاقل

وان يمت قوم بهدم او غرق او حادث عم الجميع كالحرق
ولم يكن يعلم حال السابق فلا يورث نافق من نافق
تعدهم كانهم اجانب وهكذى الراى السديد الصائب
وقد اتى القول على ما شئنا من قسمة الميراث كي يبينا
على طريق الرمز والاشارة ملخصا باوجز العبارة
فالحمد لله على التمام حمدا كثيرا ثم في دوام
ونسئل العفو عن التقصير وخير ما نامل في المصير
وغفر ما كان من الذنوب وستر ما كان من العيوب
وافضل الصلوة والتسليم على النبي المصطفى الكريم
محمد خير الانام العاقب وآله الغر ذوي المناقب
وصحبه الافاضل الابرار الصفوة الاماثل الاخيار
وحسبنا الله ونعم الكافي ذو العز والقدرة والالطاف

تمت والحمد لله رب العالمين وصلواته وسلامه
على سيدنا محمد النبي الامي وعلى آله وصحبه الطيبين الطاهرين
ليلة الجمعة لاربع ليال خلون من شوال سنة [illegible] وسبعمائة
ثق بالله تعالى محمد السقاني عفا الله عنه

THE DESIRED OBJECT OF THE INQUIRER CONCERNING ALL THE RULES OF INHERITANCE:

Composed by the learned *Shaikh*, the *Imâm Mowaffiko'ddein*, father of *Abdalla*, *Mohammed*, son of *Ali*, son of *Hosain*, *Al Rahabi*, commonly called *Ibno'l Motakanna*. May GOD be merciful to him!

In the name of God, the Clement, the Merciful; and from Him we seek assistance.

[1]

FIRST, we open the discourse
With pronouncing the praise of our Lord most High:
Praise then to GOD for what he hath bestowed,
Praise, by which we remove blindness from the sight!
Next, benediction afterwards and salutation
To the Prophet, whose religion is the ISLA'M,
MOHAMMED, seal of his Lord's messengers,
And his family, after him, and his friends!
And let us pray GOD for his aid to us
In what we have proposed to explain
From the system of the Imám, ZAID ALFARADHI *,
(Since this is among the noblest of purposes)
By learning; for learning is the most deserving of efforts
In it, and the worthiest vocation of the pious;
And this *branch of* knowledge peculiarly belongs to what
Has been openly declared among all the learned;
And ZAID has unquestionably a just title
To what the lord of the mission conferred on him,
By pronouncing his excellence, clearly saying,
"ZAID will teach you the law:" O glorious encomium!
He, therefore, best deserves to be followed by the student,
Especially since SHAFIEI takes him for a guide.
This then is his doctrine epitomised

* *Faradh'éi*, a man skilled in the *faráyidh'*, or *sacred ordinances* contained in the Alcoran.

Free from a particle of ambiguity.
The causes of inheritance among men are three;
(The possessor of any one has the advantage of succession)
And they are wedlock, collateral relation, and descent:
There is not besides them a single cause of inheritance.

[2]

And any one of three incapacities
Excludes a person from the succession;
Servitude, and homicide, and a difference of faith:
Understand then; since doubt is not like certainty.
And those, who inherit among males, are ten;
Their names are known, and every where mentioned:
The son, and the son's son, however they descend,
And the father, and his father, in the ascending line;
And the brother, on whichever side he stands,
Since GOD caused the KORAN to descend in his favour;
And the son of a brother related by the same father,
(Hear now the discourse containing no falsehood)
And the paternal uncle, and such uncle's son,
(Be thankful to him, who explains concisely and clearly)
And the husband, and the emancipater nearly connected;
And all the males, *who inherit*, are these.
And all the inheriting females are seven,
(To no woman, but them, does the law give that title)
The daughter, and the son's daughter, and the tender mother,
And the grandmother, and the wife, and the emancipatress,
And the sister, on whichever side she stands:
And this their number *thus* appears.
And know, that inheritance is of two sorts, which *are*
The SHARE, and the HEIRSHIP * of what is distributable.
Now the shares, by the declaration of the book, are six:
(Besides them *is* no share in the inheritance)

* Pronounced in India, *ferz* and *âsba*. See the last words of the report by the *Mahomedan* doctors in the *Patna* cause.

A moiety, and a fourth; next, half a fourth,
And a third, and a sixth, as the law declares,
And two thirds; and these *are* the whole.
Remember then; for "Every one, who remembers, *is* an IMAM*."

[3]

A moiety then *is* the share of five persons,
The husband, and the female child,
And the daughter of a son, on failure of daughters,
And the *whole* sister, by the opinion of every MUFTI,
And, after her, the sister, who has the same father;
This when they stand alone without any HEIR.
And a fourth *is* the share of the husband, if there be with him
Any children of the wife, who deprive him *of more;*
And this *is* for every wife, or more *than one*
On failure of children, as it is ordained.
And the eighth *is* for the wife, or the wives,
Together with sons or with daughters †,
Or with children of sons: learn then,
And remain firm in venerating study, and prosper.
And two thirds are for the daughters all together,
When there are more than one; (hear attentively)
And the same *portion is* for the daughters of a son:
(Comprehend my discourse with clear discernment)
This also *is* for two sisters, and for what exceeds *that number;*
The ingenuous and the pious have thus decided:
This, whether they be by the father and the mother,
Or by the father *only*. (Act by this *rule;* thou wilt be right)
And the third *is* the mother's share, when *there is* no child,

* A saying, I believe, of *Mahomed:* he meaned *a rememberer of his oral precepts.* Hence the name of *Hafidh*, or *Hafis*, was assumed by many illustrious persons, and, among them, by the celebrated poet.

† See the answer of *Mohammed Kásim* to the *thirteenth* question proposed to him in the *Patna* cause.

Nor any assemblage or number of brethren,
As two brothers, or two sisters, or three;
The rule in this *case* regards males as well as females.
And, if there be a husband, and a mother, and a father,
A third of what remains is allotted to her;
And so with a wife: (advance then,
And be not seated apart from the sciences.)

[4]

And a third *is* for two males or two females
Of the mother's children, without deceit;
And so, if there be more, and they seek *their allotment*,
There is no provision for them in what exceeds that share,
And females and males are held equal
In this *distribution*, as the written law declares.
And a sixth *is* the share of seven in number,
The father, and the mother, then the son's daughter,
and the grandfather,
And the sister, daughter of the father, next the grand-
mother,
And the mother's child: the number is complete.
And the father has a right to it with the children,
And so the mother, by the revelation of the Eternal:
And the same is for her with two
Of the dead man's brothers: give those two a just allotment.
And the grandfather *is* like the father, on his death,
In the distribution of what accrues to him and relieves him,
Except when there are brothers *living*,
Since they are preferable to him in proximity*;
And their due and his due shall be introduced
With a full explanation in the *different* cases.
And the son's daughter takes a sixth, when
She is with a daughter, alike in descent,

* The margin has *minho* for *wahâ*. From this verse it appears, that the degrees of consanguinity are computed by the *Mahomedans* in the same manner as by our common lawyers.

And thus a sister with a sister, who
Is related, O my brother, by the same father.
And, if the relation of the grandmothers be equal,
Both of them are called to the succession;
And a sixth *is divided* between them equally
By the just *and* the legal *mode of* partition.
And every female, who claims through one not inheriting,
Has herself no portion of the inheritance.

[δ]

And the distant kinswoman is excluded by the near
By the better opinions: (say now to me, "Enough.")
And *here* ends the distribution of the SHARES,
Without perplexity or intricacy:
And *it is* just, that we propound the law of HEIRSHIP
With every sentence concise *and* exact.
Now every one, who appropriates all the estate,
Among the near descendants or relations,
Or who takes what remains after the portions,
He is distinguished by the title of HEIR*,
As the father, and the grandfather, and his father,
And the son, in a near and a remote degree,
And the brother, and the brother's son, and the uncles,
And the master, who generously manumitted *his slave*.
And thus their sons, all of them:
(Be attentive then to what I pronounce).
And *there is not* to the distant, with the near, kinsman
Any share or portion in the inheritance.
And the brother and the uncle by mother and father
Are preferred to those descended by the half blood.
And the son and the brother with females
Have the heirship over them in the estate:

* See *A Narrative of the Proceedings in the* Patna *Cause*, p. 11. *Note* b. The *Arabick* verb *ás'aba* primarily signifies *to collect and bind together the branches of a tree:* hence the secondary sense, *to constitute the heir and head of a family.*

And there is not among women any heiress
Except her, who kindly freed the *enslaved* neck.
And the sisters, if there be daughters,
Take the residue after their portions.
And the grandfather is precluded from inheriting
By the father in *all* his three cases;
And thus the grandson by the son: (do not then
Turn aside, in deviation from the clear rules).

[6]

And the grandmothers on each side are excluded
By the mother: (remember this *rule*, and decide conformably)
And brothers are excluded by sons
And by the nearest progenitor, as we are taught,
Or by sons' sons, when there are *any;*
A number and one are in this respect alike.
And the mother's son remains in exclusion
By the grandfather (remember this with care)
And by the daughters, and the son's daughters:
(Be very assiduous in committing knowledge to memory)
Besides, the son's daughters are excluded, when
The daughters take two thirds, O young man,
Except when a male has the heirship over them
Of the son's children, by what they assert:
And, after them, the sisters, who
Descend in proximity from *both* sides,
When they take their complete portions,
Exclude the weeping daughters of the *dead* father;
And, if they have a brother present,
He has the heirship over them, in private and publick,
And the brother's son is not the heir over
Whoever is equal to, or above, him in descent.
And, if thou find a husband and a mother inheriting,
And brothers by the mother, they take *each* a third;
And so *if there be* brothers by the mother and the father,

And the whole estate is comprised in the allotment of shares,
Place them all to *the side of* the mother,
And consider their father as a rock in the sea,
And divide among the brethren a third of the estate left,
And this *is* the case of *mushtaraca, or* parcenary.

[7]

And now we will enter upon what we desire
Concerning the grandfather and the brothers, as we promised.
Incline then thine ear to what I shall say,
And collect at once the whole purport of my words;
And know, that the grandfather has *different* cases;
I will inform thee of them successively:
And he has a share with the brothers in them, when
The division redounds not to any loss upon him.
And sometimes he takes an entire third,
If there be in the distribution any descendants from him,
And there be not among them any entitled to shares,
(Be content with my explanation without questions)
And sometimes he takes a third of the remainder
After those, who have portions and provisions;
This, when the dividend is become
Too diminished for the other *share* by the press *of claimants.*
And sometimes he takes a sixth of the property,
And there is no descendant from him in *that* case;
And he, with females in the division, is
Like the brother in his share and his right.
And reckon the father's children in the number,
(And leave the mother's children with the grandfathers)
And, after that number, give to the brethren
Thy just allotment among them on failure of the grandfather.
And the sister has no share with the grandfather
In what exceeds the case already concluded;
The consort and the mother, and these two *are* all of them,

(Know then, for the best of the sect is he who knows best)
Are called, O friend, the *ácdariyyah* * ;
And they deserve to be remembered by thee.

[8]

Half then is given to her, and a sixth to him,
Until there is a remainder after the entire shares,
Then they return to the distribution
As before-mentioned: (recollect it, and thank the author)
And, if thou desire a knowledge of computation,
Thou wilt by its means attain the right proceeding:
And thou wilt understand divisions and analysis,
And wilt be acquainted with integers and fractions;
Extract then the roots in *solving* problems †,
And be not remiss in committing them to memory;
Now they, when the discourse about them is precise,
Are three, to which a remainder belongs,
And, after them, four complete *divisors*,
To which no remainder belongs, nor any fraction ‡.
Now the sixth, thou wilt see, *is* from six portions,
And the third and the fourth from twelve;
And if to an eighth a sixth be added,
The *new* root, concerning which the calculation is just,
Becomes four, which twenty follow,
As arithmeticians universally know §.
And these three roots,
If the shares be many, leave a remainder.
And let six come to the connexion of ten
In the known table commonly delineated ‖,

* The *Arabian* lexicographers give this name to the *husband* or *wife*, the *mother*, the *grandfather*, and the *whole* sister; possibly, because the rules of succession are a little *disturbed* in favour of them.

† By *ás'l*, or *root*, he must mean the *denominator* of a fraction.

‡ He, probably, considers the whole estate as *twelve*, which has *four* divisors, besides unit.

§ In our notation (which the *Asiaticks*, if they are wise, will adopt) $\frac{1}{3}+\frac{1}{4}=\frac{7}{12}$.

‖ This passage I do not understand, not knowing the *table* to which

And let that follow, which succeeds it in the series,
In the excess, by distinct progressions, to seventeen;
And the third number leaves a remainder
Of its eighth part: (proceed then, as I direct)
And half and what remains, or the two halves,
Their root, in the rule concerning them, *is* two.

[9]

And the third comes *obviously* from three;
And the fourth *is* formed from four;
And the eighth, if it be *required*, *is* from eight;
And these are the second roots,
To which no remainder belongs: know this;
Then pursue the method of verifying it, and distribute;
And, if thou hast verified the root,
The end of lengthened computation is clear gain.
Give then to each person his share, from his root,
Complete, or broken from its remainder.
And, if thou see that the shares cannot be distributed
To the partakers of the inheritance, follow what is prescribed,
And seek the way of compendiousness in the work
By multiplication and proportion: this will remove error from thee,
And restore to the whole quantity what agrees with it,
And multiply it by the root, and be thou vigilant;
Whether there be one denomination or more,
Remember well, and dismiss from thee doubt and difficulty:
And, if thou see multiplicity in the kinds,
Then they, by the rule among men,
Are numerically ranged in four terms,
The skilful *accountant* will know them by the rules;
The similar *term*, after it the proportional,

it refers. The *sexagenary table*, which *Wallis* exhibits in the seventh chapter of his *Algebra*, is commonly used in *Asia* for multiplication and division. See CHARDIN, vol. III. p. 155.

And, after that, the concordant accompanying,
And the fourth *is* the discordant separated;
(The intelligent man will inform thee of their distinctions)
Take then from the similars one,
And take from the proportionals the rest,
And take the entire number of discordants,
And multiply them by the second *term*; and be not deceived.

[10]

And, mix the whole quantity with the concordant,
And pursue by it the plainest of ways;
And multiply it into the root, which thou hast investigated.
And compute what is the sum, and what it amounts to;
And divide it; and, if the division be just,
The illiterate and the eloquent man will equally know it*:
And this is the whole of the computation,
(The work thus proceeds in similar cases)
Without prolixity or digression;
Be satisfied then with what it contains; for it is sufficient†;
And if one person die before the distribution,
Make the shares just, and know his *proper* division;
And state for him a fresh question, as it
Has been distinctly explained, in what precedes:
And consider; and, if the shares agree,
Take them; thou art right; the quantity is complete;
And mix it, or all of them, into the preceding,
If there be not an agreement between them,

* The preceding verses contain an awkward rule of *practice*; but it hence appears, that *Chardin* was mistaken, when he asserted, that neither the *Indians* nor *Persians* of his time were at all acquainted with the common *practical rules*: see his chapter on the *Persian Arithmetick*.

† It can only be of use, as an artificial memory, to those who already know the rules, but is insufficient for the teaching of them. These two or three pages are very enigmatical; but I should not despair of explaining them, if I had leisure to read a few arithmetical books of the *Arabs* or *Persians*.

And the new shares into the *former* shares
Are blended, or into the entire quantity;
And every share into the aggregate of the second
Is mixed, or into the whole quantity, manifestly:
And this is the method of *monásakhah* * ;
Mount then by it the lofty degrees of excellence.
And, if there be among the claimants of the estate
A real hermaphrodite, removing *all* doubts,
Distribute to the less *evident* and to the certain;
Thou wilt allot with justice the clear portion;
And this is the rule of pregnant women,
Which is founded on the certain, and the less *evident*.

[11]

And, if many kinsmen die by ruin or drowning,
Or a calamity overwhelming all, as fire,
And the case of the survivor be not known,
And one deceased cannot be heir to another deceased,
Reckon them *all*, as if they were strangers;
And this is the sound and true determination.
And now the discourse has come to what we desired
Concerning the distribution of estates, so that it is made clear,
By way of short hint and allusion,
Explained in an abbreviation of the sense.
Praise then to GOD in perfection,
Praise, abundant, complete in eternity;
And let us ask forgiveness for our defects,
And the best of what we hope in the place aspired to,
And pardon for what is passed of our sins,
And a covering for what is passed of our faults;
And the fairest of salutations and benisons

* The grammarians, translated by *Golius*, thus explain the word *tesásokh* or *monásakhah*: "Mors et successio continua hæredum, quæ fit 'integrâ manente et indivisâ hæreditate;" but the last words convey no adequate idea of the thing.

On the prophet, the pure, the illustrious,
MOHAMMED, the best of created beings, the last *of prophets*,
And on his family, bright with glorious qualities,
And his companions, the excellent, the noble,
The spotless, the exalted, the beneficent!
And our sufficient help is GOD! O all-sufficient!
Endued with greatness, and with power, and with clemency!

The work is ended. Praise be to GOD,
The ruler of worlds! and his blessing
And peace on our lord
MOHAMMED, the Unlettered Prophet,
And on his family and his companions,
The excellent, the unblemished!
On Friday night, one of the four nights
at the close of *Shewál* in the year
seven hundred and twelve *

The Transcriber, surnamed
FAKHRO'L SA'BIKA'NI
(or, Excelling his Predecessors)
confides in GOD Most High:
May GOD forgive his sins!

* Y. C. 1312.

AL SIRÁJIYYAH:

OR,

THE MOHAMMEDAN LAW OF

INHERITANCE;

WITH

A COMMENTARY,

BY

SIR WILLIAM JONES.

THE

PREFACE.

THE two *Muſelman* authors, whom I now introduce to my countrymen in *India*, are *Shaïkh* SIRA'JU'DDI'N, a native of *Sejávend*, and *Sayyad* SHARI'F, who was born at *Jurján* in *Khwárezm* near the mouth of the *Oxus*, and is ſaid to have died, at the age of ſeventy-ſix years, in the city of *Shíráz*: their compoſitions have equal authority in all the *Mohammedan* courts, which follow the ſyſtem of ABU' HANI'FAH, with thoſe of LITTLETON and COKE in the courts at *Weſtminſter*; and there is, indeed, a wonderful analogy between the works of the old *Arabian* and *Engliſh* lawyers, and between thoſe of their ſeveral commentators; with this difference in favour of our own country, that LITTLETON is always too clear to need a gloſs, and with this difference in favour of the *Arabs*, that the ſole object of SHARI'F was to explain and illuſtrate his text, without an oſtentatious diſ-

play of his own erudition; but, when it is admitted, that a deſire of extreme brevity has often made the *Sirájíyyah* obſcure, the reader ſhould in candour allow, that every author muſt appear to great diſadvantage in a literal tranſlation, eſpecially when his own idiom differs totally from that of his tranſlator, when his terms of art muſt be rendered by new words, which uſe alone can make eaſy, and when the ſyſtem, which he unfolds to his countrymen, has no reſemblance to any other, that the world ever knew. In the *Sharífiyyah* (for that is the popular title of the *Arabian* comment) we find little or no obſcurity; and, if there be a fault in the book, it is a ſcrupulous minuteness of explanation, and a needleſs anxiety to remove every little cloud, which the reader himſelf might diſperſe by the ſlighteſt exertion of his intellect. Both works were tranſlated into *Perſian* by the order of Mr. HASTINGS; and the tranſlation, which bears the name of *Maulavi* MUHAMMED KA'SIM, muſt appear excellent, and would be really uſeful, to ſuch as had not acceſs to the *Arabick* originals; but the text and comment are blended without any diſcrimination, and both are ſo intermixed with the notes of the tranſlator himſelf, that it is often impoſſible to ſeparate what is fixed law from what is merely his own opinion: he has

alſo erred (though it be certainly a pardonable errour) on the ſide of clearneſs, and has made his work ſo tediouſly perſpicuous, that it fills, incluſively of a turgid and flowery dedication, about ſix hundred pages, and a faithful verſion of it in *Engliſh* would occupy a very large volume.

If the pains, which have been taken to render my own work as complete as poſſible, be meaſured by the ſize of it, they muſt be thought very inconſiderable; but in truth no greater pains could have been taken with any work; and it would have been a far eaſier taſk to have dictated or written a verbal tranſlation of the two comments on my text, than to have made a careful ſelection of all that is important in them; for which purpoſe I peruſed each of them three times with the utmoſt attention, and have condenſed in little more than fifty ſhort pages the ſubſtance of them both, without any ſuperfluous paſſage, that I ſhould wiſh to be retrenched, and with as much perſpicuity as I was able to give, in ſo ſhort a compaſs, to a ſyſtem in ſome parts rather abſtruſe: leſt men of buſineſs, for whom the book is intended, ſhould be alarmed at firſt ſight by the magnitude of it, I have omitted all the minute criticiſm, various readings, and curious *Arabian* literature; moſt of the anecdotes concerning old

lawyers, and all their ſubtil controverſies with the arguments on both ſides; together with the demonſtrations of arithmetical rules and the very long proceſſes, after the prolix method of the *Arabs*, in words inſtead of figures. Practical utility being my ultimate object in this work, I had nothing to do with literary curioſities, how agreeable ſoever they might have been in their proper places; but, in order to attain that object by a full explanation of every thing uſeful in my text, I was under a neceſſity of retaining the *Arabian* phraſeology both in law and arithmetick, and muſt requeſt the *Engliſh* reader to diſmiſs from his mind, while he ſtudies the *Sirájiyyah*, thoſe appropriated ſenſes, in which many of our words, as *heir*, *inheritance*, *root*, and the like, are uſed in our own ſyſtems. One *Arabick* word I was at a loſs to tranſlate preciſely in our language without circumlocution: the chief problem, in the diſtribution of eſtates among *Muſelman* heirs, is *to find the leaſt number, by which an eſtate muſt be divided, ſo that all the ſhares and the reſidue may be legally diſtributed without a fraction:* this they call *integration*; but, if I could have hazarded ſuch a word in *Engliſh*, the frequent repetition of it would have been extremely harſh; and I have generally called it *arrangement* or *verification*, which are popular ſenſes of the *Arabick* verbal noun;

but the number ſought, or, to uſe the *Arabian* expreſſion, *the integrant of the caſe*, I have uſually named the *diviſor* of the eſtate.

It will be ſeen in the *Sirájíyyah*, that the ſyſtem of ZAID, though in part exploded by ABU HANI'FAH, had very powerful ſupporters, and its author is always mentioned in terms of reſpect: it is the ſyſtem, which I publiſhed at *London* above ten years ago; and I am not ſurpriſed, that, without a native aſſiſtant or even a marginal gloſs, I could not then interpret the many technical words, which no dictionary explains, except in their popular ſenſes; but, though my literal verſion of the tract by ALMUTAKANNA ſeems for pages together like a ſtring of enigmas, yet the following work makes every ſentence in it perfectly clear; and the original, which was engraved from a very old manuſcript, appears to be a lively and elegant epitome of the law of inheritance according to ZAID, but manifeſtly deſigned to aſſiſt the memory of young ſtudents, who were to get it by heart, when they had learned the rules from ſome longer treatiſe, or from the mouths of their preceptors. This may be no improper place to inform the reader, that, although ABU HANI'FAH be the acknowledged head of the prevailing ſect, and has given his name to it, yet ſo great veneration is ſhown to ABU YU'SUF and the lawyer MUHAMMED, that, when

they *both* diſſent from their maſter, the *Muſſelman* judge is at liberty to adopt either of the two deciſions, which may ſeem to him the more conſonant to reaſon, and founded on the better authority.

I am ſtrongly diſpoſed to believe, that no poſſible queſtion could occur on the *Mohammedan* law of ſucceſſion, which might not be rapidly and correctly anſwered by the help of this work; but it would be eaſy to confirm or invalidate my opinion by the following method. Let one capital letter, or more, if neceſſary, repreſent each of the ſharers, reſiduaries, and diſtant heirs; and let thoſe letters be the initials of the ſeveral words, in aid of the memory, but ſo choſen (as without difficulty they may be) that all may be different; let them be placed in alphabetical order, and connected by the ſign of addition; let an enumeration be then made, by the known rule, of all the poſſible caſes, in which they can occur, two and two, three and three, and ſo forth; let them accordingly be arranged in tables from the loweſt number to the higheſt; and let the ſhare or allotment of each be ſet above the letter, in the place of an exponent. If the queſtion then were propoſed, in what manner the property of HINDA muſt be diſtributed among her *daughter*, her *ſiſter by the ſame father only*, and the *daughter of her ſon*, the table of the *third*

claſs would exhibit this formula D $\frac{3}{6}$ + DF $\frac{2}{6}$ + DS $\frac{1}{6}$; or, if AMRU had left his *wife*, *two daughters*, and *both his parents*, the formula in the *fourth* table would be 2 D $\frac{16}{27}$ + F $\frac{4}{27}$ + M $\frac{4}{27}$ + W $\frac{3}{27}$; where the denominator of the index would be the *integrant*, as the *Arabs* call it, *of the caſe*, and the numerator would point out the ſeveral allotments: thus might we conſtruct a ſet of tables, mathematically accurate, in which the legal diſtribution, in every poſſible caſe, might be ſeen in a moment without thought and even without learning; and ſuch a blind facility, though not very conſiſtent with the dignity of ſcience, would certainly be convenient in practice. We might alſo arrange the whole in a ſynthetical method (of all the moſt luminous and ſatisfactory) by beginning with the *ſentences* of the *Koràn*, as with indubitable axioms, followed by the genuine oral *maxims* of MUHAMMED; by ſubjoining the *points*, on which all the learned have at length agreed, and by concluding with *caſes* deduced from thoſe three ſources of juridical knowledge, to which there ſhould be conſtant references by numbers in the manner of geometricians: this method I propoſe to adopt in the Digeſt, from which I have ſeparated the *Sirájiyyah*, becauſe it ſeemed worthy of being exhibited entire, and may be conſidered as Inſtitutes of *Arabian* Law on the important title, mentioned by the *Britiſh*

OMAR, he would in his beſt mood have aſked his counſellor ſternly, whether he imagined himſelf wiſer than GOD and his Prophet, and, in one of his paſſionate ſallies, would have ſpurned him as a blaſphemer from his preſence, had he been even his deareſt friend or his ableſt general: the placid and benevolent ALI would have given a harſh rebuke to ſuch an adviſer; and AURANGZI'B himſelf, the bloodieſt of aſſaſſins and the moſt avaricious of men, would not have adopted and proclaimed ſuch an opinion, whatever his courtiers and ſlaves might have ſaid, in their zeal to aggrandize their maſter, to a foreign phyſician and philoſopher, who too haſtily believed them, and aſcribed to ſuch a ſyſtem all the deſolation, of which he had been a witneſs. Conqueſt could have made no difference; for, either the law of the conquering nation was eſtabliſhed in *India*, or that of the conquered was ſuffered to remain: if the firſt, the *Koràn* and the *dicta* of MUHAMMED were fountains, too ſacred to be violated, both of public and private law; if the ſecond, there is an end of the debate; for the old *Hindus* moſt aſſuredly were abſolute proprietors of their land, though they called their ſovereigns Lords of the Earth; as they gave the title of Gods on Earth to their *Bráhmens*, whom they puniſhed, nevertheleſs, for *theft* with all due ſeverity. Should it be urged, that, although an

Indian prince may have no right, in his *executive* capacity, to the land of his ſubjects, yet, as the ſole *legiſlative* power, he is above control; I anſwer firmly, that *Indian* princes never had, nor pretended to have, an unlimited legiſlative authority, but were always under the control of laws believed to be divine, with which they never claimed any power of diſpenſing.

I am happy in an opportunity of advancing theſe arguments againſt a doctrine, which I think unjuſt, unfounded, and big with ruin; for, in the courſe of nine years, I have ſeen enough of theſe provinces and of their inhabitants, to be convinced, that, if we hope to make our government a bleſſing to them and a durable benefit to ourſelves, we muſt realize our hope, not by wringing for the preſent the largeſt poſſible revenue from our *Aſiatick* ſubjects, but by taking no more of their wealth than the publick exigencies, and their own ſecurity, may actually require; not by diminiſhing the *intereſt*, which landlords muſt naturally take in *their own ſoil*, but by augmenting it to the utmoſt, and giving them aſſurance, that it will deſcend to their heirs: when their laws of property, which they literally hold *ſacred*, ſhall in practice be ſecured to them; when the land-tax ſhall be ſo moderate, that they cannot have a colourable pretence to rack their tenants, and

when they ſhall have a well grounded confidence, that the proportion of it will never be raiſed, except for a time on ſome great emergence, which may endanger all they poſſeſs; when either the performance of every legal contract ſhall be enforced, or a certain and adequate compenſation be given for the breach of it; when no wrong ſhall remain unredreſſed, and when redreſs ſhall be obtained at little expenſe, and with all the ſpeed, that may be conſiſtent with neceſſary deliberation; then will the population and reſources of *Bengal* and *Bahar* continually increaſe, and our nation will have the glory of conferring happineſs on conſiderably more than *twenty-four* millions (which is at leaſt the preſent number) of their native inhabitants, whoſe cheerful induſtry will enrich their benefactors, and whoſe firm attachment will ſecure the permanence of our dominion.

AL SIRÁJIYYAH

THE

INTRODUCTION.

IN THE NAME OF THE MOST MERCIFUL GOD!

PRAISE *be* to GOD, the Lord of *all* worlds; the praiſe of thoſe who give *Him* thanks! And *His* bleſſing on the beſt of created beings, MUHAMMED, and his excellent family! The Prophet of GOD (on whom be his bleſſing and peace!) ſaid: "Learn the laws of inheritance, "and teach them to the people; for they *are* "one half of uſeful knowledge." Our learned in the law (to whom GOD be merciful!) ſay: "There belong to the property of "a perſon deceaſed four ſucceſſive duties *to* "*be performed by the magiſtrate:* firſt, his funeral ceremony and burial without ſuperfluity "of expenſe, yet without deficiency; next, the

females, who are the wife, and the daughter, and the ſon's daughter, or other female deſcendant how low ſoever, the ſiſter by one father and mother, the ſiſter by the father's ſide, and the ſiſter by the mother's ſide, the mother, and the true grandmother, that is, ſhe who is related to the deceaſed without the intervention of a falſe grandfather. (A falſe male anceſtor is, where a female anceſtor intervenes in the line of aſcent.) The father takes in three caſes; 1, an abſolute ſhare, which is a ſixth, and that with the ſon, or ſon's ſon, how low ſoever; 2, a legal ſhare, and a reſiduary portion alſo; and that with a daughter, or a ſon's daughter, how low ſoever in the degree of deſcent; 3, he has a ſimple reſiduary title, on failure of children and ſon's children, or other low deſcendants. The true grandfather has the ſame intereſt with the father, except in four caſes, which we will mention preſently, if it pleaſe GOD; but the grandfather is excluded by the father, *if he be living*; ſince the father is the mean of conſanguinity between the grandfather and the deceaſed. The mother's children alſo take in three caſes: a ſixth is the ſhare of one only; a third, of two, or of more: males and females have an equal diviſion and right; but the mother's children are excluded by children of the deceaſed and by ſon's children,

On Impediments to Succeſſion.

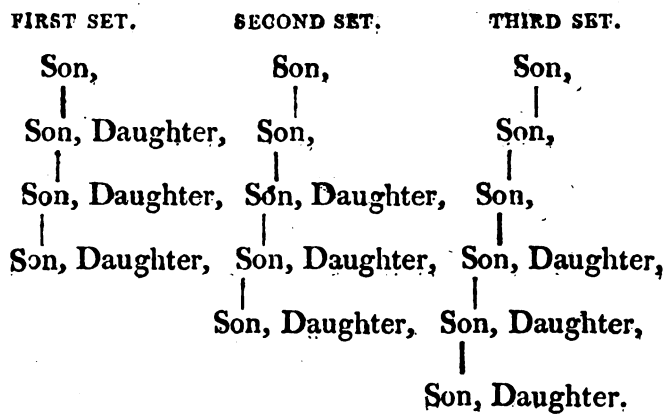
IMPEDIMENTS to ſucceſſion *are* four; 1, ſervitude, whether it be perfect or imperfect; 2, homicide, whether puniſhable by retaliation, or expiable; 3, difference of religion; and 4, difference of country, either actual, as between an alien enemy and an alien tributary; or qualified, as between a fugitive and a tributary, or between two fugitive enemies from two different ſtates: now a ſtate differs from another by having different forces and ſovereigns, there being no community of protection between them.

On the Doctrine of Shares, and the Perſons entitled to them.

THE *furud*, or ſhares, appointed in the book of Almighty GOD, are ſix: a moiety, a quarter, an eighth, two thirds, one third, and a ſixth, *ſome formed* by doubling, and *ſome* by halving. Now thoſe entitled to theſe ſhares are twelve perſons; four males, who are the father and the true grandfather or other male anceſtor, how high ſoever *in the paternal line*, the brother by the ſame mother, and the huſband; and eight

them reſiduaries. As to the remainder between them, the male has the portion of two females; and all of the ſon's daughters are excluded by the ſon himſelf.

If a man leave three ſon's daughters, ſome of them in lower degrees than others, and three daughters of the ſon of another ſon, ſome of them in lower degrees than others, and three daughters of the ſon's ſon of another ſon, ſome of them in lower degrees than others, as in the following table, this is called the caſe of *taſhbib*.



Here the eldeſt of the firſt line has none equal in degree with her; the middle one of the firſt line is equalled in degree by the eldeſt of the ſecond; and the youngeſt of the firſt line is equalled by the middle one of the ſecond, and by the eldeſt of the third line; the youngeſt

of the ſecond line is equalled by the middle one of the third line, and the youngeſt of the third ſet has no equal in degree.—When thou haſt comprehended this, then we ſay: the eldeſt of the firſt line has a moiety; the middle one of the firſt line has a ſixth together with her equal in degree to make up two thirds; and thoſe in lower degrees never take any thing, unleſs there be a ſon with them, who makes them reſiduaries, both her who is equal to him in degree, and her who is above him; but who is not entitled to a ſhare: thoſe below him are excluded.

Siſters by the ſame father and mother may be in five caſes: half goes to one alone; two thirds to two or more; and, if there be brothers by the ſame father and mother, the male has the portion of two females; and the females become reſiduaries through him by reaſon of their equality in the degree of relation to the deceaſed; and they take the reſidue, when they are with daughters, or with ſon's daughters, by the ſaying of Him, on whom be bleſſing and peace! "Make ſiſters, with daughters, reſi-"duaries."

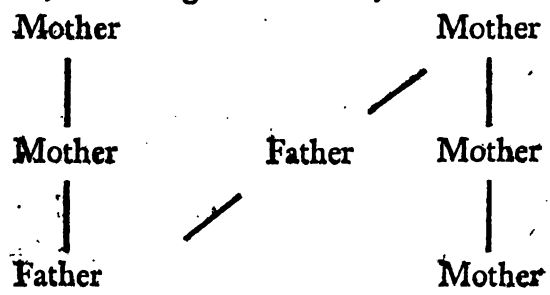
Siſters by the ſame father only are like ſiſters by the ſame father and mother, and may be in ſeven caſes: half goes to one, and two thirds to two or more on failure of ſiſters by the ſame father and mother; and with one ſiſter by

the ſame father and mother, they have a ſixth, as the complement of two thirds; but they have no inheritance with two ſiſters by the ſame father and mother, unleſs there be with them a brother by the ſame father, who makes them reſiduaries; and then the reſidue is *diſtributed* among them *by the ſacred rule* "to the male "what is equal to the ſhare of two females." The ſixth caſe is, where they are reſiduaries with daughters or with ſon's daughters, as we have before ſtated *it*.

Brothers and ſiſters by the ſame father and mother, and by the ſame father only, are all excluded by the ſon and the ſon's ſon, in how low a degree ſoever, and by the father *alſo*, as it is agreed *among the learned*, and even by the grandfather according to ABU HANIFAH, on whom be the mercy of ALMIGHTY GOD! And thoſe of the half-blood are alſo excluded by the brothers of the whole blood.

The mother takes in three caſes: a ſixth with a child, or a ſon's child, even in the loweſt degree, or with two brothers and ſiſters or more, by whichever ſide they are related; and a third of the whole on failure of thoſe juſt-mentioned; and a third of the reſidue after the ſhare of the huſband or wife; and this in two caſes, either when there are the huſband and both parents, or the wife and both parents: if there be a

grandfather inſtead of a father, then the mother takes a third of the whole property, though not by the opinion of ABU YUSUF, on whom be GOD's mercy! for he ſays, that in this caſe alſo ſhe has only a third of the reſidue. The grandmother has a ſixth, whether ſhe be by the father or by the mother, whether alone or with more, if they be true grandmothers and equal in degree; but they are all excluded by the mother, and the paternal female anceſtors alſo by the father; and in like manner, by the grandfather, except the father's mother, even in the higheſt degree; for ſhe takes with the grandfather, ſince ſhe is not *related* through him. The neareſt grandmother, *or female anceſtor*, on either ſide, excludes the more diſtant grandmother, on whichever ſide ſhe be; whether the nearer grandmother be entitled to a ſhare of the inheritance, or be herſelf excluded. When a grandmother has but one relation, as the father's mother's mother, and another has two ſuch relations, or more, as the mother's mother's mother, who is alſo the father's father's mother, according to this table,



then a ſixth is divided between them, according to ABU YUSUF, in moieties, reſpect being had to their perſons; but, according to MUHAMMED (on whom be GOD's mercy!) in thirds, reſpect being had to the ſides.

On Reſiduaries.

RESIDUARIES by relation *to the deceaſed* are three: the reſiduary in his own right, the reſiduary in another's right, and the reſiduary together with another. Now the reſiduary in his own right is every male, in whoſe line of relation to the deceaſed no female enters; and of this ſort there are four claſſes; the offspring of the deceaſed, and his root; and the offspring of his father and of his neareſt grandfather, a preference being given, I mean a preference in the right of inheritance, according to proximity of degree. The offspring of the deceaſed are his ſons *firſt*; then their ſons, in how low a degree ſoever: then *comes* his root, or his father; then his paternal grandfather, and their paternal grandfathers, how high ſoever; then the offspring of his father, or his brothers; then their ſons, how low ſoever; and then the offſpring of his grandfather, or his uncles: then their ſons, how low ſoever. Then the ſtrength

of conſanguinity prevails: I mean, he, who has two relations is preferable to him, who has only one relation, whether it be male or female, according to the ſaying of Him, on whom be peace! "Surely, kinſmen by the ſame father "and mother ſhall inherit before kinſmen by "the ſame father only:" thus a brother by the ſame father and mother is preferred to a brother by the father only, and a ſiſter by the ſame father and mother, if ſhe become a reſiduary with the daughter, is preferred to a brother by the father only; and the ſon of a brother by the ſame father and mother is preferred to the ſon of a brother by the ſame father only; and the rule is the ſame in regard to the paternal uncles of the deceaſed; and, after them, to the paternal uncles of his father, and, after them, to the paternal uncles of his grandfather.

The reſiduaries in another's right are four females; namely, thoſe whoſe ſhares are half and two thirds, and who become reſiduaries in right of their brothers, as we have before mentioned in their different caſes; but ſhe who has no ſhare among females, and whoſe brother is the heir, doth not become a reſiduary in his right; as in the caſe of a paternal uncle and a paternal aunt.

As to reſiduaries together with others: ſuch is every female who becomes a reſiduary with

another female; as a ſiſter with a daughter, as we have mentioned before. The laſt reſiduary is the maſter of a freedman, and then his reſiduary heirs, in the order before ſtated; according to the ſaying of Him, on whom be bleſſing and peace! "The maſter bears a relation like "that of conſanguinity;" but females have nothing among the heirs of a manumittor, according to the ſaying of Him, on whom be bleſſing and peace! "Women have nothing "from their relation to freedmen, except when "they have themſelves manumitted a ſlave; or "their freedman has manumitted one, or they "have ſold a manumiſſion to a ſlave, or their "vendee has ſold it to his ſlave, or they have "promiſed manumiſſion after their death, or "their promiſee has promiſed it after his death, "or unleſs their freedman or freedman's freed-"man draw a relation *to them.*"

If the freedman leave the father and ſon of his manumittor, then a ſixth of the right over the property of the freedman veſts in the father, and the reſidue in the ſon, according to *ABU YUSUF*; but, according to both ABU HANIFAH and MUHAMMED, the whole right veſts in the ſon; and, if a ſon and a grandfather of the manumittor be left, the whole right over the freedman goes to the ſon, as all the learned agree. When a man poſſeſſes as his ſlave a

kinſman in a prohibited degree, he manumits him, and his right veſts in him; as if there be three daughters, the youngeſt of whom has twenty *dinàrs*, and the eldeſt, thirty; and they two buy their father for fifty *dinàrs*; and afterwards their father die leaving ſome property; then two thirds of it are divided in thirds among them, as their legal ſhares, and the reſidue goes in fifths to the two who bought their father; three fifths to the eldeſt and two fifths to the youngeſt; which may be ſettled by dividing the whole into forty-five parts.

On Excluſion.

EXCLUSION is of two ſorts: 1. *Imperfect*, or an excluſion from one ſhare, and an admiſſion to another; and this takes place in reſpect of five perſons, the huſband or wife, the mother, the ſon's daughter, and the ſiſter by the ſame father; and an explanation of it has preceded. 2. *Perfect* excluſion: there are two ſets of perſons having a claim to the inheritance: one of which ſets is not excluded entirely in any caſe; and they are ſix perſons, the ſon, the father, the huſband, the daughter, the mother, and the wife; but the other ſet inherit in one caſe and in another caſe

are excluded. This is grounded on two principles; one of which is, that "whoever is related "to the deceaſed through any perſon, ſhall not "inherit, while that perſon is living;" as a ſon's ſon, with the ſon; except the mother's children, for they inherit with her; ſince ſhe has no title to the whole inheritance: the ſecond *principle* is, "that the neareſt *of blood* muſt take," and who the neareſt is, we have explained *in the chapter* on reſiduaries. A perſon incapable of inheriting doth not exclude any one, *at leaſt* in our opinion; but, according to IBNU MASUUD (may GOD be gracious to him!) he excludes imperfectly; as an infidel, a murderer, and a ſlave. A perſon excluded may, as all *the learned* agree, exclude *others*; as, *if there be* two brothers or ſiſters or more, on which ever ſide they are, they do not inherit with the father *of the deceaſed*, yet they drive the mother from a third to a ſixth.

On the Diviſors of Shares.

KNOW, that the ſix ſhares mentioned in the book of Almighty GOD are of two ſorts: of the firſt are a moiety, a fourth, and an eighth; and of the ſecond ſort are two thirds, a third, and a ſixth, as the fractions are halved and

doubled. Now, when any of theſe ſhares occur in caſes ſingly, the diviſor for each ſhare is that number which gives it its name (except half, which is from two), as a fourth denominated from four, an eighth from eight, and a third from three: when they occur by two or three, and are of the ſame ſort, then each integral number is the proper diviſor to produce its fraction, and alſo to produce the double of that fraction, and the double of that, as ſix produces a ſixth, and likewiſe a third, and two thirds; but, when half, *which is* from the firſt ſort, is mixed with all of the ſecond ſort or with ſome of them, then *the diviſion of the eſtate muſt be* by ſix; when a fourth is mixed with all of the ſecond *ſort* or with ſome of them, then the diviſion muſt be into twelve; and when an eighth is mixed with all of the ſecond ſort, or with ſome of them, then it muſt be into four and twenty parts.

On the Increaſe.

Aul, or *increaſe*, is, when ſome fraction remains above the *regular* diviſor, or when the diviſor is too ſmall to admit one ſhare. Know, that the whole number of diviſors is ſeven, four

of which have no increaſe, namely, two, three, four, and eight; and three of them have an increaſe. The *diviſor*, ſix, is, therefore, increaſed by the *âûl* to ten, either by odd, or by even, numbers; twelve is raiſed to ſeventeen by odd, not by even, numbers; and twenty-four is raiſed to twenty-ſeven by one increaſe only; as in the caſe, called *Mimberiyya* (or a caſe anſwered by ALI when he was in the pulpit), which was this, "*A man left* a wife, two daughters, and both his parents." After this there can be no increaſe, except according to IBN MASÛÛD (may GOD be gracious to him!) for, in his opinion, the diviſor twenty-four may be raiſed to thirty-one; as *if a man leave* a wife, his mother, two ſiſters by the ſame parents, two ſiſters by the ſame mother only, and a ſon rendered incapable of inheriting.

On the Equality, Proportion, Agreement, and Difference of two Numbers.

THE *temáthul* of two numbers is the equality of one to the other; the *tedákhul* is, when the ſmaller of two numbers exactly meaſures the larger, or exhauſts it; or we call it *tedákhul*, when the larger of two numbers is divided ex-

actly by the ſmaller; or we may define it thus, when the larger exceeds the ſmaller by one number or more equal to it, or equal to the larger; or it is, when the ſmaller is an aliquot part of the larger, as three of nine. The *tawáfuk*, or agreement, of two numbers is, where the ſmaller does not exactly meaſure the larger, but a third number meaſures them both, as eight and twenty, each of which is meaſured by four, and they agree in a fourth; ſince the number meaſuring them is the denominator of a fraction common to both. The *tabáyun* of two numbers is, when no third number whatever meaſures the two diſcordant numbers, as nine and ten. Now the way of knowing the agreement or diſagreement between two different quantities is, that the greater be diminiſhed by the ſmaller quantity on both ſides, once or oftener, until they agree in one point; and if they agree in unit only, there is no numerical agreement between them; but, if they agree in any number, then they are *(ſaid to be) mutawáfik* in a fraction, of which that number is the denominator; if two, in half; if three, in a third; if four, in a quarter; and ſo on, as far as ten; and, above ten, they agree in a fraction; I mean, if the number be eleven, the fraction of eleven, and, if it be fifteen, by the fraction of fifteen. Pay attention to this *rule*.

On Arrangement.

In arranging caſes there is need of ſeven principles; three, between the ſhares and the perſons, and four between perſons and perſons. Of the three *principles* the firſt is, that, if the portions of all the claſſes be divided among them without a fraction, there is no need of multiplication, as *if a man leave* both parents and two daughters. The ſecond is, that, if the portions of one claſs be fractional, yet there be an agreement between their portions and their perſons, then the meaſure of the number of perſons, whoſe ſhares are broken, muſt be multiplied by the root of the caſe, and its increaſe, if it be an increaſed caſe, as *if a man leave* both parents and ten daughters, or *a woman leave* a huſband, both parents, and ſix daughters. The third *principle* is, that, if their portions leave a fraction, and there be no agreement between thoſe portions and the perſons, then the whole number of the perſons, whoſe ſhares are broken, muſt be multiplied into the root of the caſe, as *if a woman leave* her huſband and five ſiſters by the ſame father and mother. Of the four *other principles* the firſt is, that, when there is a fractional diviſion between two claſſes or more, but an equality between the numbers

of the perſons, then the rule is, that one of the numbers be multiplied into the root of the caſe; as if *there be* ſix daughters, and three grandmothers, and three paternal uncles. The ſecond is, when ſome of the numbers equally meaſure the others; then the rule is, that the greater number be multiplied into the root of the caſe; as, *if a man leave* four wives and three grandmothers and twelve paternal uncles. The third is, when ſome of the numbers are *mutawâfik*, or compoſit, with others; then the rule is, that the meaſure of the firſt of the numbers be multiplied into the whole of the ſecond, and the product into the meaſure of the third, if the product of the third be *mutawâfik*, or, if not, into the whole of the third, and then into the fourth, and ſo on, in the ſame manner; after which the product muſt be multiplied into the root of the caſe: as, *if a man leave* four wives, eighteen daughters, fifteen female anceſtors, and ſix paternal uncles. The fourth *principle* is, when the numbers are *mutabâyan*, or not agreeing one with another; and then the rule is, that the firſt of the numbers be multiplied into the whole of the ſecond, and the product multiplied by the whole of the third, and that product into the whole of the fourth, and the laſt product into the root of the caſe; as, *if a*

man leave two wives, ſix female anceſtors, ten daughters, and ſeven paternal uncles.

Section.

WHEN thou deſireſt to know the ſhare of each claſs by arrangement, multiply what each claſs has from the root of the caſe by what thou haſt already multiplied into the root of the caſe, and the product is the ſhare of that claſs; and, if thou deſireſt to know the ſhare of each individual in that claſs by arrangement, divide what each claſs has from the principle of the caſe by the number of the perſons in it, then multiply the quotient into the multiplicand, and the product *will be* the ſhare of each individual in that claſs. Another method is, to divide the multiplied number by whichever claſs thou thinkeſt proper, then to multiply the quotient into the ſhare of that ſet, by which thou haſt divided the multiplied number, and the product *will be* the ſhare of each individual in that ſet. Another method is by the way of proportion, which is the cleareſt; and it is, that a proportion be aſcertained for the ſhare of each claſs from the root of the caſe to the number of per-

ſons one by one, and that, according to ſuch proportion from the multiplied *number*, a ſhare be given to each individual of that claſs.

On the Diviſion of the Property left among Heirs and among Creditors.

If there be a diſagreement between the property left and the *number ariſing from the* arrangement, then multiply the portion of each heir, according to that arrangement, into the aggregate of the property, and divide the product by the number of the arrangement, but, when there is an agreement between the arrangement and the property left, then multiply the portion of each heir, according to the arrangement into the meaſure of the property, and divide the product by the meaſure of the *number ariſing from the* arrangement: the quotient is the portion of that heir in both methods. This *rule* is in order to know the portion of each individual among the heirs; but, in order to know the portion of each claſs of them, multiply what each claſs has, according to the root of the caſe, into the meaſure of the property left, then divide the product by the meaſure of the caſe, if there be an agreement be-

tween the property left and the caſe; but, if there be a diſagreement between them, then multiply into the whole of the property left, and divide the product by the whole *number ariſing from the* verification of the caſe; and the quotient *will be* the portion of that claſs in both methods. Now, as to the payment of debts, the debts of all the creditors ſtand in the place of the arranging number.

On Subtraction.

WHEN any one agrees to take a part of the property left, ſubtract his ſhare from *the number ariſing* by the proof, and divide the remainder of the property by the portions of thoſe who remain; as *if a woman leave* her huſband, her mother, and a paternal uncle: now *ſuppoſe that* the huſband agrees to take what was in his power of his bridal gift to the wife; this is deducted from among *the heirs:* then what remains is divided between the mother and the uncle in thirds, according to their legal ſhares; and thus there will be two parts for the mother, and one for the uncle.

On the Return.

THE return is the converſe of the increaſe; and it *takes place* in what remains above the ſhares of thoſe entitled to them, when there is no legal claimant of it: this *ſurplus* is returned to the ſharers according to their rights, except the huſband or the wife; and this is the opinion of all the *Prophet's* companions, as ÂLI and his followers, may GOD be gracious to them! And our maſters (to whom GOD be merciful!) have aſſented to it: ZAID, the ſon of THA'BIT ſays, that the ſurplus doth not revert, but *goes* to the publick treaſury; and to this opinion have aſſented ÛRWAH and ALZUHRI' and MA'LIC and ALSHA'FIÎ, may GOD be merciful to them!

Now the caſes on this head are *in* four diviſions: the firſt of them *is*, when there is in the caſe but one ſort of kinſmen, to whom a return muſt be made, and none of thoſe who are not entitled to a return: then ſettle the caſe according to the number of perſons; as, when the deceaſed has left two daughters, or two ſiſters, or two female anceſtors; ſettle it, therefore, by two. The ſecond *is*, when there are joined in the caſe two or three ſorts of thoſe, to whom a return muſt be made, without any of thoſe, to

whom there is no return: then ſettle the caſe according to their ſhares; I mean by two, if there be two ſixths in the caſe; or by three, when there are a third and a ſixth in it; or by four, when there are a moiety and a ſixth in it; or by five, when there are in it two thirds and a ſixth, or half and two ſixths, or half and a third. The third *is*, when in the firſt caſe, there is *any one* to whom no return can be made; then give the ſhare of him or her, to whom there is no return, according to the loweſt *denominator*, and if the reſidue exactly quadrate with the number of perſons, who are entitled to a return, *it is* well; as *if there be* a huſband and three daughters; but, if they do not agree, then multiply the meaſure *of the number* of the perſons, if there be an agreement between the number of perſons and the reſidue, into the denominator of the ſhares of thoſe, to whom no return is to be made: as *if there be* a huſband, and ſix daughters; if not, multiply the whole number of the perſons into the denominator of the ſhare of thoſe, to whom there is no return; and the product will ſet the caſe right. The fourth is, when, in the ſecond caſe, there are any to whom no return is made: then divide what remains from the denominator of the ſhare of him or them, who have no return, by the caſe of thoſe, to whom a re-

and this *is the caſe*, when *a man leaves* a grandfather, a ſiſter by the ſame father and mother, and two ſiſters by the ſame father only: *in this caſe* there remains to thoſe ſiſters a tenth of the eſtate, and the correct denominator *is* twenty; but, if there be, in the preceding caſe, one ſiſter by the ſame father only, nothing remains for her; and if one, entitled to a legal ſhare, be mixed with them, then, after he has received his ſhare, the grandfather has the beſt in three arrangements; either the diviſion, when *a woman leaves* her huſband, a grandfather, and a brother; or a third of the reſidue *is given*, when a man leaves a grandfather, a grandmother, and two brothers, and a ſiſter by the ſame father and mother. Or a ſixth of the whole eſtate *is given*, when a man leaves a grandfather and a grandmother, a daughter, and two brothers; and, when a third of the reſidue is better from the grandfather, and the reſidue has not a complete third, multiply the denominator of the third into the root of the caſe. If a woman leave a grandfather, her huſband, a daughter, her mother, and a ſiſter by the ſame father and mother, or by the ſame father only, then a ſixth is beſt for the grandfather, and the *root of the* caſe is raiſed to thirteen, and the ſiſter has nothing. Know, that ZAID, the ſon of THABIT (on whom be GOD's grace!) has

" thren of the whole blood and the brethren by " the father's ſide inherit not with the grand- " father:" this is alſo the deciſion of ABU HANÍFA (on whom be GOD's mercy!) and judgments are given conformably to it. ZAID the ſon of THÁBIT, indeed, aſſerts, that they *do* inherit with the grandfather, and of this opinion are both *ABU YUSUF and MUHAMMED*, as well as MÁLIC and ALSHAFII. According to ZAID, the ſon of THÁBIT (on whom be GOD's mercy!) the grandfather, with brothers or ſiſters of the whole blood and by the father's ſide, takes the beſt in two caſes, from the *mukáſamah*, or *diviſion*, and from a third of the whole eſtate. The meaning of *mukáſamah* is, that the grandfather is placed in the diviſion as one of the brethren, and the brethren of the half blood enter into the diviſion with thoſe of the whole blood, to the prejudice of the grandfather; but, when the grandfather has received his allotment, then the half blood are removed from the reſt, *as if* diſinherited, and receive nothing; and the reſidue goes to the brethren of the whole blood; except when among thoſe of the whole blood there is a ſingle ſiſter, who receives her legal ſhare, I mean the whole after the grandfather's allotment: then, if any thing remains, *it goes* to the half blood; if not, they have nothing;

and this *is the caſe*, when *a man leaves* a grandfather, a ſiſter by the ſame father and mother, and two ſiſters by the ſame father only: *in this caſe* there remains to thoſe ſiſters a tenth of the eſtate, and the correct denominator *is* twenty; but, if there be, in the preceding caſe, one ſiſter by the ſame father only, nothing remains for her; and if one, entitled to a legal ſhare, be mixed with them, then, after he has received his ſhare, the grandfather has the beſt in three arrangements; either the diviſion, when *a woman leaves* her huſband, a grandfather, and a brother; or a third of the reſidue *is given*, when a man leaves a grandfather, a grandmother, and two brothers, and a ſiſter by the ſame father and mother. Or a ſixth of the whole eſtate *is given*, when a man leaves a grandfather and a grandmother, a daughter, and two brothers; and, when a third of the reſidue is better from the grandfather, and the reſidue has not a complete third, multiply the denominator of the third into the root of the caſe. If a woman leave a grandfather, her huſband, a daughter, her mother, and a ſiſter by the ſame father and mother, or by the ſame father only, then a ſixth is beſt for the grandfather, and the *root of the* caſe is raiſed to thirteen, and the ſiſter has nothing. Know, that ZAID, the ſon of THABIT (on whom be GOD's grace!) has

not placed the ſiſter by the ſame father and mother, or by the ſame father, as entitled to a ſhare with the grandfather, except in the caſe, named *acdarîyyah*, and that is, the huſband, the mother, a grandfather, and a ſiſter by the ſame father and mother, or by the ſame father only; *in which caſe* the huſband *ought to have* a moiety; the mother, a third; the grandfather, a ſixth; and the ſiſter, a moiety; then the grandfather annexes his ſhare to that of the ſiſter, and, a diviſion is made between them *by the rule* "a male has the portion of two females;" *and this is*, becauſe the diviſion is beſt for the grandfather. The root is *regularly* ſix, but is increaſed to nine; and a correct diſtribution is made by twenty-ſeven. The caſe is called *acdarîyyah*, becauſe it occurred on *the death of* a woman belonging to the tribe of ACDAR. If, inſtead of the ſiſter, there be a brother or two ſiſters, there is no increaſe, nor *is that caſe* an *acdarîyyah*.

On Succeſſion to Veſted Intereſts.

If ſome of the ſhares become veſted inheritances before the diſtribution, as *if a woman leave* her huſband, a daughter, and her mother,

and the huſband die, before the eſtate can be diſtributed, leaving a wife and both his parents, *if* then the daughter die leaving two ſons, a daughter, and a *maternal* grandmother, and then the grandmother die leaving her huſband and two brothers, the principle in this *event* is, that the caſe of the firſt deceaſed be arranged, and that the allotment of each heir be *conſidered* as delivered according to that arrangement; that, next, the caſe of the ſecond deceaſed be arranged, and that a compariſon be made between what was in his hands, *or veſted in intereſt*, from the firſt arrangement, and between the ſecond arrangement, in three ſituations; and if, on account of equality, what *is* in his hands from the firſt arrangement quadrate with the ſecond arrangement, then there is no need of multiplication; but, if it be not right, then ſee whether there be an agreement between the two, and multiply the meaſure of the ſecond arrangement into the whole of the firſt arrangement; and, if there be a diſagreement between them, then multiply the whole of the ſecond arrangement into the whole of the firſt arrangement, and the product *will be* the denominator of both caſes. The allotments of the heirs of the firſt deceaſed muſt be multiplied into the former multiplicand, I mean into the ſecond arrangement or into its meaſure; and the allotments

of the heirs of the ſecond deceaſed muſt be multiplied into the whole of what *was* in his hands, or into its meaſure; and, if a third or a fourth die, put the ſecond product in the place of the firſt arrangement, and the third caſe in the place of the ſecond, in working; *and* thus in *the caſe of* a fourth and a fifth, and ſo on to infinity.

On Diſtant Kindred.

A DISTANT kinſman *is* every relation, who is neither a ſharer nor a reſiduary. The generality of the *Prophet*'s companions repeat a tradition concerning the inheritance of diſtant kinſmen; and, according to this, our maſters and their followers (may GOD be merciful to them!) have decided; but ZAID, the ſon of THABIT (on whom be GOD's grace!) ſays: "there is no inheritance for the diſtant kin-"dred, but the property *undiſpoſed of* is placed "in the publick treaſury;" and with him agree MALIC and ALSHAFII, on whom be GOD's mercy! Now theſe diſtant kindred *are* of four claſſes: the firſt claſs is deſcended from the deceaſed; and they are the daughter's children, and the children of the ſon's daughters. The ſecond ſort *are* they, from whom the deceaſed deſcend; and they are the excluded grand-

fathers and the excluded grandmothers. The third ſort are deſcended from the parents of the deceaſed; and they *are* the ſiſter's children and the brother's daughters, and the ſons of brothers by the ſame mother only. The fourth ſort are deſcended from the two grandfathers and two grandmothers of the deceaſed; and they are, paternal aunts, and uncles by the ſame mother *only*, and maternal uncles and aunts. Theſe, and all who are related to the deceaſed through them, are among the diſtant kindred. ABU SULAIMAN reports from MUHAMMED the ſon of ALHASAN, *who reported* from ABU HANIFAH (on whom be GOD's mercy!) that the ſecond ſort are the neareſt of the *four* ſorts, how high ſoever they aſcend; then the firſt, how low ſoever they deſcend; then the third, how low ſoever; and laſtly, the fourth, how diſtant ſoever *their degree:* but ABU YUSUF and ALHASAN the ſon of ZIYAD, report from ABU HANIFAH (on whom be the mercy of GOD!) that the neareſt of the *four* ſorts is the firſt, then the ſecond, then the third, then the fourth, like the order of the reſiduaries; and this *is* taken *as a rule* for deciſion. According to both *ABU YUSUF and MUHAMMED*, the third ſort has a preference over the maternal grandfather.

On the Firſt Claſs.

THE beſt entitled of them to the ſucceſſion is the neareſt of them in degree to the deceaſed; as the daughter's daughter, who is preferred to the daughter of the ſon's daughter; and, if *the claimants* are equal in degree, then the child of an heir is preferred to the child of a diſtant relation; as the daughter of a ſon's daughter is preferred to the ſon of a daughter's daughter; but, if their degrees be equal, and there be not among them the child of an heir, or, if all of them be the children of heirs, then, according to ABU YUSUF (may GOD be merciful to him!) and ALHASAN, ſon of ZIYAD, the perſons of the branches are conſidered, and the property is diſtributed among them equally, whether the condition of the roots, as male or female, agree or diſagree; but MUHAMMED (on whom be GOD's mercy!) conſiders the perſons of the branches, if the ſex of the roots agree, *in which reſpect* he concurs with the other two; and he conſiders the perſons of the roots, if their ſexes be different, and he gives to the branches the inheritance of the roots, in oppoſition to the two *lawyers*. For inſtance, when *a man* leaves a daughter's ſon, and a daughter's daughter, *then*, according to ABU YUSUF and ALHASAN, the property is diſtributed between them, *by the rule* "the male has the portion of

" two females," their perſons being conſidered; and, according to MUHAMMED, in the ſame manner; becauſe the ſexes of the roots agree: and, if *a man* leave the daughter of a daughter's ſon, and the ſon of a daughter's daughter, *then*, according to the two *firſt mentioned lawyers*, the property *is divided* in thirds between the branches, by conſidering the perſons, two thirds of it *being given* to the male, and one third to the female; but, according to MUHAMMED (on whom be GOD's mercy!) the property *is divided* between the roots, I mean *thoſe* in the ſecond rank, in thirds, two thirds *going* to the daughter of the daughter's ſon, *namely*, the allotment of her father, and one third of it to the ſon of the daughter's daughter, *namely*, the ſhare of his mother. Thus, according to MUHAMMED (to whom GOD be merciful!) when the children of the daughters are different *in ſex*, the property is divided according to the firſt rank *that* differs among the roots; then the males are arranged in one claſs, and the females in another claſs, after the diviſion, and what goes to the males is collected and diſtributed according to the higheſt difference that occurs among their children, and, in the ſame manner, what goes to the females; and thus the operation is continued to the end according to this ſcheme:

S	S	S	D	D	D	D	D	D	D	D	D
D	D	D	D	D	D	D	D	D	D	D	D
S	D	D	S	S	S	D	D	D	D	D	D
D	D	D	S	D	D	S	S	S	D	D	D
D	S	D	D	D	D	S	D	D	S	D	D
D	D	D	D	D	S	D	D	S	D	S	D

Thus MUHAMMED (to whom GOD be merciful!) takes the ſex from the root at the time of the diſtribution, and the number from the branches; as, *if a man* leave two ſons of a daughter's daughter's daughter, and a daughter of a daughter's daughter's ſon, and two daughters of a daughter's ſon's daughter, in this form:

The Deceaſed,

Daughter	Daughter	Daughter
Son	Daughter	Daughter
Daughter	Son	Daughter
Two Daughters	Daughter	Two Sons.

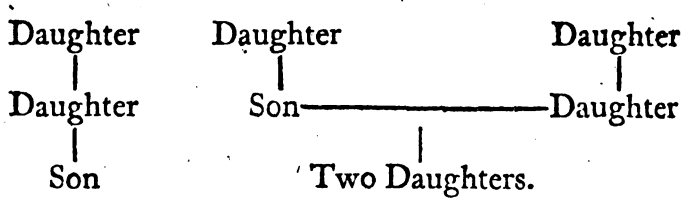
In this caſe according to ABU YUSUF (on whom be GOD's mercy!) the property is divided among the branches in ſeven parts, by conſidering their perſons; but, according to MUHAMMED (to whom GOD be merciful!) the property is diſtributed according to the higheſt difference *of ſex*, I mean in the ſecond rank, in ſeventhſ, by the number of branches in the roots; and, according to him, four ſeventhſ of it *go* to the daughters of the daughter's ſon's daughter; ſince that is the ſhare of their grand-

father, and three ſeventhſ of it, which are the allotment of the two daughters, are divided between their two children, I mean thoſe in the third rank, in moieties; one moiety to the daughter of the daughter's daughter's ſon, *which* is the ſhare of her father, and the other moiety to the two ſons of the daughter's daughter's daughter, *being* the ſhare of their mother: the correct diviſor of the property is, in this caſe, twenty-eight. The opinion of MUHAMMED (on whom be GOD's mercy!) is the more generally received of the two traditions from ABU HANIFAH (to whom GOD be merciful!) in all deciſions concerning the diſtant kindred; and this was the firſt opinion of ABU YUSUF; then he departed *from it*, and ſaid that the roots were by no means to be conſidered.

A Section.

OUR learned *lawyers* (on whom be the mercy of GOD!) conſider the *different* ſides in ſucceſſion; except that ABU YUSUF (may GOD be merciful to him!) conſiders the ſides in the perſons of the branches, and MUHAMMED (on whom be GOD's mercy!) conſiders the ſides in the roots; as, when *a man* leaves two daughters of a daughter's daughter, who *are* alſo the two daughters of a daughter's ſon, and the ſon of a daughter's daughter, according to this ſcheme:

The Deceaſed.



In this caſe, according to ABU YUSUF, the property *is divided* among them in thirds, and then the deceaſed is conſidered as if he had left four daughters and a ſon; two thirds of it, therefore, go to the two daughters, and one third to the ſon: but, according to MUHAMMED (to whom GOD be merciful!) the eſtate *is divided* among them in twenty-eight parts, to the two daughters twenty-two ſhares (ſixteen in right of their father and ſix ſhares in right of their mother) and to the ſon ſix ſhares in right of his mother.

On the Second Claſs.

He among them, who is preferred in the ſucceſſion, is the neareſt of them to the deceaſed, on which ſide ſoever he ſtands; and, in the caſe of equality in the degrees of proximity, then he, who is related to the deceaſed through an heir, is preferred by the opinion of ABU SUHAIL, *ſurnamed* ALFERAIDI, of ABU FUDAIL ALKHASSAF, and of ALI, the ſon of ISAI ALBASRI; but, no preference *is given* to him

according to ABU SULAIMAN ALJURJÁNI, and ABU ALI AL BAIHATHI ALBUSTI. If their degrees be equal, and there be none among them, who is related through an heir, or, if all of them be related through an heir, then, if the ſex of thoſe, through whom they are related, agree, and their relation be on the ſame ſide, the diſtribution is according to their perſons, but if the ſex of thoſe, to whom they are related, be different, the property is diſtributed according to the firſt rank that differs in ſex, as in the firſt claſs; and, if their relation differ, then two thirds *go* to thoſe on the father's ſide, that *being* the ſhare of the father, and one third *goes* to thoſe on the mother's ſide, that *being* the ſhare of the mother: then what has been allotted to each ſet is diſtributed among them, as if their relation were the ſame.

On the Third Claſs.

THE rule concerning them is the ſame with that concerning the firſt claſs; I mean, *that* he *is* preferred in the ſucceſſion, who is neareſt to the deceaſed: and, if they be equal in relation, then the child of a reſiduary *is* preferred to the child of a more diſtant kinſman; as, *if a man leave* the daughter of a brother's ſon, and the ſon of a ſiſter's daughter, both of them by *the ſame*

father and mother, or by *the ſame* father, or one of them by *the ſame* father and mother, and the other by *the ſame* father *only: in this caſe* the whole eſtate *goes* to the daughter of the brother's ſon, becauſe ſhe is the child of a reſiduary; and, if it be by *the ſame* mother *only*, *diſtribution is made* between them *by the rule*, "A male has "the ſhare of two females," *and*, by the opinion of ABU YUSUF (to whom GOD be merciful!) in thirds, according to the perſons, but, by that of MUHAMMED (may GOD be merciful to him!) in moieties according to the roots; and, if they be equal in proximity, and there be no child of a reſiduary among them, or *if* all of them be children of reſiduaries, or if ſome of them be children of reſiduaries, and ſome of them children of thoſe entitled to ſhares, and their relation differ, then ABU YUSUF (to whom GOD be merciful!) conſiders the ſtrongeſt *in conſanguinity*; but MUHAMMED (may GOD be merciful to him!) divides the property among the brothers and ſiſters in moieties, conſidering as well the number of the branches, as the ſides in the roots; and what has been allotted to each ſet is diſtributed among their branches, as in the firſt claſs: thus, *if a man leave* the daughter of the daughter of a ſiſter by *the ſame* father and mother, ſhe is preferred to the ſon of the daughter of a brother by the ſame father *only*, accord-

ing to ABU YUSUF (to whom GOD be merciful!) by reaſon of the ſtrength of relation; but, according to MUHAMMED (may God be merciful to him!) the property is divided between them both in moieties by conſideration of the roots. So, when *a man* leaves three daughters of different brothers, and three ſons and three daughters of different ſiſters, as in *this* figure:

The Deceaſed.

Siſter—Siſter—Siſter—Brother—Brother—Brother

by the ſame

Mother—Father—Father—Mother-Father—Father
and Mother *and* Mother

Son Son Son Daughter Daughter Daughter Daughter Daughter Daughter.

In this caſe, according to ABU YUSUF, the property is divided among the branches of the whole blood, then among the branches by the ſame father, then among the branches by the ſame mother, *according to the rule*, "the male has the allotment of two females," in fourths, by conſidering the perſons; but, according to MUHAMMED (to whom GOD be merciful!) a third of the eſtate is divided equally among the branches by the ſame mother, in

thirds, by conſidering the equality of their roots in the diviſion of the parents, and the remainder among the branches of the whole blood in moieties, by conſidering in the roots the number of the branches; one half to the daughter of the brother, the portion of the father, and the other between the children of the ſiſter, the male having the allotment of two females, by conſidering the perſons; and *the eſtate* is correctly divided by nine. If *a man* leave three daughters of different brothers' ſons, in this manner:

The Deceaſed.

Daughter —— Daughter —— Daughter

of a Son of a Brother by the ſame

Father and Mother —— Father —— Mother

all the property goes to the daughter of the ſon of the brother by the ſame father and mother, by the unanimous opinion *of the learned*, ſince ſhe is the child of a reſiduary, and hath alſo the ſtrength of conſanguinity.

On the Fourth Claſs.

THE rule as to them *is*, that, when there is only one of them, he has a right to the whole property, ſince there is none to obſtruct him;

and, when there are ſeveral, and the ſides of their relation are the ſame, as paternal aunts and paternal uncles by the ſame mother *with the father*, or maternal uncles and aunts, then the ſtronger of them in conſanguinity is preferred, by the general aſſent; I mean, they, who are *related* by father and mother, are preferred to thoſe, who are *related* by the father *only*, and they, who are *related* by the father, are preferred to thoſe, who are *related* by the mother only, whether they be males or females; and, if there be males and females, and their relation be equal, then the male has the allotment of two females; as, *if there be* a paternal uncle and aunt both by *one* mother, or a maternal uncle and aunt, both by the ſame father and mother, or by the ſame father, or by the ſame mother only: and if the ſides of their conſanguinity be different, then no regard *is ſhown* to the ſtrength of relation; as, if *there be* a paternal aunt by the ſame father and mother, and a maternal aunt by the ſame mother, or a maternal aunt by the ſame father and mother, and a paternal aunt by the ſame mother only, then two thirds *go* to the kindred of the father, for they *are* the father's allotment, and one third to the kindred of the mother, for that *is* the mother's allotment; then what is allotted to each ſet is divided among them, as if the place of their conſanguinity were the ſame.

On their Children, and the Rules concerning them.

THE rule as to them *is* like the rule concerning the firſt claſs; I mean, *that* the beſt entitled of them to the ſucceſſion is the neareſt of them to the deceaſed on whichever ſide he is *related*; and, if they be equal in relation, and the place of their conſanguinity be the ſame, then he, who has the ſtrength of blood, is preferred, by the general aſſent; and, if they be equal in degree and in blood, and the place of their conſanguinity be the ſame, then the child of a reſiduary *is* preferred to whoever is not *ſuch*; as, *if a man leave* the daughter of a paternal uncle, and the ſon of a paternal aunt, both of them by *the ſame* father and mother, or by *the ſame* father, all the property goes to the daughter of the paternal uncle; and, if one of them be by *the ſame* father and mother, and the other by the ſame father only, *then* all the eſtate goes to the claimant, who has the ſtrength of conſanguinity, according to the clearer tradition; *and this* by analogy to the maternal aunt by the ſame father, for though ſhe be the child of a diſtant kinſman, yet ſhe is preferred, by the ſtrength of conſanguinity, to the maternal aunt by the *ſame* mother *only*, though ſhe be the child of an heir; ſince the weight which prevails by itſelf, that

is, the ſtrength of conſanguinity, is greater than the weight by another, which is the deſcent from an heir. Some of them (the learned) ſay, *that* the whole eſtate goes to the daughter of the paternal uncle by the ſame father, ſince ſhe is the daughter of a reſiduary; and, if they be equal in degree, yet the place of their relation differ, they have no regard *ſhown* to the ſtrength of conſanguinity, nor to the deſcent from a reſiduary, according to the clearer tradition; by analogy to the paternal aunt by the ſame father and mother, for though ſhe have two bloods, and be the child of an heir on both ſides, and her mother be entitled to a legal ſhare, *yet* ſhe is not preferred to the maternal aunt by the *ſame* father; but two thirds *go* to whoever is related by the father; and their regard is ſhown to the ſtrength of blood; then to the deſcent from a reſiduary; and one third *goes* to whoever is related by the mother, and there *too* regard is ſhown to ſtrength of conſanguinity: then, according to ABU YUSUF (may GOD be merciful to him!) what belongs to each ſet is divided among the perſons of their branches, with attention to the number of ſides in the branches; and, according to MUHAMMED (may GOD be merciful to him!) the property is diſtributed by the firſt line, *that* differs, with attention to the number of the branches and of the ſides in

the roots, as in the firſt claſs; then this rule is applied to the ſides of the paternal uncles of his parents and their maternal uncles; then to their children; then to the ſide of the paternal uncles of the parents of his parents, and to their maternal uncles; then to their children, as in the *caſe* of reſiduaries.

On Hermaphrodites.

To the hermaphrodite, *whoſe ſex is quite* doubtful; *is allotted* the ſmaller of two ſhares, I mean the worſe of two conditions, according to ABU HANI'FAH (may GOD be merciful to him!) and his friends, and this is the doctrine of the generality of the *Prophet*'s companions (may GOD be gracious to them!) and conformable to it are deciſions *given;* as, when *a man* leaves a ſon, and a daughter, and an hermaphrodite, then the hermaphrodite has the ſhare of a daughter, ſince that is aſcertained: and, according to ÂÁMIR ALSHÂBI (and this is the opinion of IBNU ÂBBÁS, may GOD be gracious to them both!) the hermaphrodite has a moiety of the two ſhares in the controverſy; but *the two great lawyers* differ in putting in practice the doctrine of ALSHÂBI: *for* ABU YUSUF ſays, *that* the ſon has one ſhare, and the daughter half a

ſhare, and the hermaphrodite three fourths of a ſhare, ſince the hermaphrodite would be entitled to a ſhare, if he were a male, and to half a ſhare, if he were a female, and this *is* ſettled by *his* taking half the ſum of the two portions; or, we may ſay, he takes the moiety which is aſcertained, together with half the moiety which is diſputed, ſo that there come to him three fourths of a ſhare; for he (ABU YÚSUF) pays attention to the legal ſhare and to the increaſe, and he verifies *the caſe* by nine: or, we may ſay, the ſon has two ſhares, and the daughter one ſhare, and the hermaphrodite a moiety of the two allotments, and that *is* a ſhare and half a ſhare. But MUHAMMED (may GOD be merciful to him!) ſays, that the hermaphrodite would take two fifths of the eſtate, if he were a male, and a fourth of the eſtate, if he were a female, and that he takes a moiety of the two allotments, and that *will give him* one fifth and an eighth by attention to both ſexes; and the caſe is rectified by forty; ſince that is the product of one of the *numbers in the* two caſes, which is four, multiplied into the other, which is five, and that product multiplied by two *(which is the number of the)* caſes; and then he, who takes any thing by five, *has it* multiplied into four, and he, who takes any thing by four, *has it* multiplied into

five; ſo that thirteen ſhares *go* to the hermaphrodite, and eighteen to the ſon, and nine to the daughter.

On Pregnancy.

THE longeſt time of pregnancy *is* two years, according to ABU HANI'FAH (may GOD be merciful to him!) and his companions; and according to LAITH, the ſon of SÂD ALFAHMI (may GOD be merciful to him!) three years; and, according to ALSHÁFIÎ (may GOD be merciful to him!) four years: but according to ALZUHRI (may GOD be merciful to him!) ſeven years: and the ſhorteſt time for it is ſix months. There is reſerved for the child in the womb, according to ABU HANÍFAH (may GOD be merciful to him!) the portion of four ſons, or the portion of four daughters, whichever of the two is moſt; and there is given to the reſt of the heirs the ſmalleſt of the portions; but, according to MUHAMMED (may GOD be merciful to him!) there is reſerved the portion of three ſons or of three daughters, whichever of the two is moſt: LAITH, ſon of SÂD, (may GOD be gracious to him!) reports this *opinion* from him; but, by another report, *there is reſerved* the portion of two ſons; and one of

the two opinions is that of ABU YÚSUF (may GOD be merciful to him!) as HISHÁM reports it from him; but ALKHAS'S'A'F reports from ABU YÚSUF (may GOD be merciful to him!) that there ſhould be reſerved the ſhare of one ſon or of one daughter; and, according to this, deciſions *are made*; and ſecurity muſt be taken, according to his opinion. And, if the pregnancy was by the deceaſed, and *the widow* produce a child at the full *time* of the longeſt period *allowed* for pregnancy, or within it, and the woman hath not confeſſed her having broken her legal term *of abſtinence*, *that child* ſhall inherit, and others may inherit from him; but, if ſhe produce a child after the longeſt *time* of geſtation, he ſhall not inherit, nor ſhall others inherit from him: and if the pregnancy was from another man than the deceaſed, and ſhe, *the kinſwoman*, produce a child in ſix months or leſs, he ſhall inherit; but, if ſhe produce the child after the leaſt period of geſtation, he ſhall not inherit.

Now the way of knowing the life of the child at the time of its birth, is, that there be found in him that, by which life is proved; as a voice, or ſneezing, or weeping, or ſmiling, or moving a limb; and, if the ſmalleſt *part* of the child come out, and he then die, he ſhall not inhe-

rit; but if the greater *part* of him come out, and then he die, he ſhall inherit: and, if he come out ſtraight *(or with his head firſt)* then his breaſt is conſidered; I mean, if his whole breaſt come out, he ſhall inherit; but if he come out inverted *(or with his feet firſt)* then his navel is conſidered.

The chief rule in arranging caſes on pregnancy is, that the caſe be arranged by two ſuppoſitions, I mean by ſuppoſing, that the child in the womb is a male, and by ſuppoſing, that it is a female: then, compare the arrangement of both caſes; and, if the numbers agree, multiply the meaſure of one of the two into the whole of the other; and, if they diſagree, then multiply the whole of one of the two into the whole of the other, and the product will be the arranger of the caſe: then multiply the allotment of him, who would have ſomething from the caſe, which ſuppoſes a male, into that of the caſe, which ſuppoſes a female, or into its meaſure; and then that of him, who takes on the ſuppoſition of a female, into the caſe of the male, or into its meaſure, as we have directed concerning the hermaphrodite; then examine the two products of that multiplication; and whether of the two is the leſs, that ſhall be given to ſuch an heir; and the difference between them muſt be reſerved from the allotment of that

heir; and, when the child appears, if he be entitled to the whole of what has been reſerved, it is well; but, if he be entitled to a part, let him take that part, and let the remainder be diſtributed among the *other* heirs, and let there be given to each of thoſe heirs what was reſerved from his allotment: as, when a man has left a daughter and both his parents, and a wife pregnant, then the caſe *is rectified* by twenty-four on the ſuppoſition, that the child in the womb is a male, and by twenty-ſeven on the ſuppoſition, that it is a female: now between the two numbers of the arrangement there is an agreement in a third; and when the meaſure of one of the two is multiplied into the whole of the other, the product amounts to two hundred and ſixteen, and by that *number* is the caſe verified; and, on the ſuppoſition of its male ſex, the wife takes twenty-ſeven ſhares, and each of the two parents, thirty-ſix; but, on the ſuppoſition of its female ſex, the wife has twenty-four, and each of the parents, thirty-two; and twenty-four are given to the wife, and three ſhares from her allotment are reſerved; and from the allotment of each of the parents are reſerved four ſhares; and thirteen ſhares are given to the daughter; ſince the *part* reſerved in her right *is* the allotment of four ſons, according to ABU HANÍFAH (may GOD be

merciful to him!) and when the ſons are four, then her allotment is one ſhare and four ninths of a ſhare out of four-and-twenty multiplied into nine, and that makes thirteen ſhares; and this *belongs* to her, and the reſidue *is* reſerved, which *amounts to* an hundred and fifteen ſhares. If the widow bring forth one daughter or more, then all the *part* reſerved *goes* to the daughters; and, if ſhe bring forth one ſon or more, then muſt be given to the widow and both parents what was reſerved from their ſhares; and what remains muſt be divided among the children: and, if ſhe bring forth a dead child, then muſt be given to the widow and both parents what was reſerved from their ſhares, and to the daughter a complete moiety, that is, ninety-five ſhares *more*, and the remainder, which is nine ſhares, to the father, ſince he *is* the reſiduary.

On a Loſt Perſon.

A LOST perſon is *conſidered as* living in *regard to* his eſtate; ſo that no one can inherit from him; and his eſtate is reſerved, until his death can be aſcertained; or the term for *a preſumption of it* has paſſed over: now the traditionary opinions differ concerning that term; for, by the clearer tradition, "when, not one "of his equals in age remains, judgement may

" be given of his death;" but HASAN, the ſon of ZIYAD, reports from ABU HANÍFAH (may GOD be merciful to him!) that the term is an hundred and twenty years from the day on which he was born; and MUHAMMED ſays, an hundred and ten years; and ABU YÚSUF ſays, an hundred and five years; and ſome of them, *the learned*, ſay, ninety years; and according to that *opinion* are deciſions *made*. Some of *the learned in the law* ſay, that the eſtate of a loſt perſon muſt be reſerved for the final regulation of the *Imàm*, and the judgement ſuſpended as to the right of another perſon, ſo that his ſhare from the eſtate of his anceſtors muſt be kept, as in the *caſe* of pregnancy; and, when the term *is* elapſed, and judgement given of his death, then his eſtate *goes* to his heirs, *who are* to be found, according to the judgement on his deceaſe; and, what was reſerved on his account from the eſtate of his anceſtor, is reſtored to the heir of his anceſtor, from whoſe eſtate that ſhare was reſerved; ſince the loſt perſon *is* dead as to the eſtate of another.

The principle in arranging caſes concerning a loſt perſon *is*, that the caſe be arranged on a ſuppoſition of his life, and then arranged on a ſuppoſition of his death; and the reſt of the operation *is* what we have mentioned in the chapter of pregnancy.

On an Apoſtate.

WHEN an apoſtate *from the faith* has died naturally, or been killed, or paſſed into a hoſtile country, and the *Kádi* has given judgement on his paſſage *thither*, then what he had acquired, at the time of his being a believer, *goes* to his heirs, *who are* believers; and what he has gained ſince the time of the apoſtaſy is placed in the publick treaſury, according to ABU HANÍFAH (may GOD be merciful to him!) but, according to the two *lawyers* (ABU YÚSUF *and* MUHAMMED) both the acquiſitions *go* to his believing heirs; and, according to AL-SHÂFIÎ (may GOD be merciful to him!) both the acquiſitions are placed in the publick treaſury; and what he gained after his arrival in the hoſtile country, that *is* confiſcated by the general conſent; and all the property of a female apoſtate *goes* to her heirs, *who are* believers, without diverſity of opinion among our maſters, to whom God be merciful! but an apoſtate ſhall not inherit from any one, neither from a believer nor from an apoſtate like himſelf, and ſo a female apoſtate ſhall not inherit from any one; except when the people of a whole diſtrict become apoſtates altogether, for then they inherit reciprocally.

On a Captive.

THE rule concerning a captive *is* like the rule of other believers in regard to inheritance, as long as he has not departed from the faith; but, if he has departed from the faith, then the rule concerning him *is* the rule concerning an apoſtate; but, if his apoſtaſy be not known, nor his life nor his death, then the rule concerning him *is* the rule concerning a loſt perſon.

On Perſons drowned, or burned, or overwhelmed in Ruins.

WHEN a company *of perſons* die, and it is not known which of them died firſt, they are conſidered, as if they had died at the ſame moment; and the eſtate of each of them *goes* to his heirs, *who are* living; and ſome of the deceaſed ſhall not inherit from others: this is the approved *opinion*. But ÂLÍ and IBNU MASÛÛD ſay, according to one of the traditions from them, *that* ſome of them ſhall inherit from others, except in what each of them has inherited from the companion of his fate.

A

COMMENTARY

ON

THE SIRÁJIYYAH.

IN our adminiſtration of juſtice to *Mohammedans* according to their own laws, it will be of no uſe to inquire, what their legiſlator meant by declaring, that *the law of inheritances conſtituted one half of juridical knowledge*:* if he intended any thing more than a ſtrong aſſertion of its importance, he probably had in contemplation the two general modes of acquiring property, *contracts* and *ſucceſſion*, or the agreement of parties and the operation of law; and this explanation of the phraſe, which had occurred to me on my firſt peruſal of it, is alſo ſuggeſted by *Sayyad SHARÍF*, together with a more fanciful interpretation, which *Máulavi* KÁSIM has adopted, that, *life* and *death* being incident to our probationary ſtate in this world, and the

* Page 213.

law of *ſucceſſion* manifeſtly relating to the *dead*, it is properly oppoſed to all other laws, which preſcribe the duties and aſcertain the rights of the *living*; but we merely take notice of the ſentence, that no part of the *Sirájíyyah* may be unexplained, and proceed to the *four* acts, which, on the deceaſe of a *Mohammedan*, are to be ſucceſſively performed by the magiſtrate, or under his authority.

I. A regard to public decency and convenience, as well as to publick religion and health, ſeems in all nations to require, that the bodies of deceaſed perſons be removed out of ſight, with all due ſpeed and ſolemnity, at a moderate expenſe to be defrayed, even before the payment of their juſt debts, out of the property left by them, on which no legal claim, from hypothecation or otherwiſe, had previouſly attached: but the *Muſelman* lawyers, who admit, that the funeral charges muſt in the firſt place be defrayed, aſſign a very whimſical reaſon for ſuch a priority; *becauſe*, they ſay, the *winding-ſheet and other clothes of the dead are analogous to ſuitable apparel worn by the living, and conſequently ſhould not be liable to the claims of a creditor*. The *legal* expenſes of burying a *Mohammedan* are very moderate, both in the *number* and *value* of the clothes, in which the deceaſed is to be wrapped: as more than *three* pieces of

cloth for a man, or than *five* pieces for a woman, would be held a prodigal ſuperfluity, and leſs than thoſe, a niggardly deficiency, of expenſe, ſo, if the funeral clothes of AMRU or HINDA were dearer than the veſture uſually worn by them, when alive, it would be a culpable exceſs; and if cheaper, a blameable defect; but, if in fact they had been uſed to wear one ſort of apparel on ſolemn feſtivals, another in viſiting their friends, and a third, in their own houſes, the value of their viſiting dreſs muſt regulate that of their burial, and either extreme would be too prodigal or too parſimonious. Should their debts, indeed, cover the whole of their property, the *legal* expenſe of the funeral muſt be reduced to the *ſufficient* expenſe, as it is called; that is, to *two* pieces of cloth for AMRU and to *three* for HINDA: the names, dimenſions, and uſes of all the cloths uſed in funerals, both for men and for women, are enumerated in *Perſian* by *Máulaví* KASIM; but it would be uſeleſs to mention them; and it ſeems only neceſſary to add on this article, that if deceaſed perſons leave no property whatever, or none without a ſpecial lien on it, the funeral expenſes muſt be paid by ſuch of their relations, as would have been compellable by law to maintain them, when living; and, if there be no ſuch relations, by the publick trea-

ſury, in which there is always an ample fund ariſing from forfeitures and eſcheats.

II. After the burial, all the juſt debts of the deceaſed muſt be paid out of his remaining aſſets, as far as they extend; and, if there be many creditors, they muſt be ſatisfied in equal proportion, except that *a debt of health*, to uſe the *Arabian* phraſe, muſt be diſcharged before a *debt of ſickneſs*; that is, a debt *contracted* or *acknowledged*, while the party was of ſound underſtanding and body, is preferred, when legally proved, to one *acknowledged* in ſickneſs, but of which no other evidence is produced. A religious vow, or promiſe of a charitable donation, as an atonement for ſin, conſtitutes a debt *in conſcience* only; and the ſum thus promiſed muſt be paid out of a third part of the aſſets, after the legal creditors have been ſatisfied, provided that it was bequeathed by will; but, if no will was made, the temporal eſtate ſhall not be charged with a mere debt of religion.

III. The legacies of a *Muſelman*, to the prejudice of his heirs, muſt not exceed *a third part* of the property left by him, and remaining after the diſcharge of his debts: over a third of ſuch reſidue he has abſolute power; and his legatee ſhall receive it immediately, whether a ſpecifick thing or certain ſum of money, or only a fractional part of his eſtate, was be-

queathed. This is the opinion of SHARIF; though a diſtinction, which the text by no means implies, has been taken between a *determinate* and an *indeterminate* legacy.

IV. We come now to the *diſtribution* of his eſtate, remaining after the payment of debts and legacies, among his *heirs* (for ſo we may call them, although *real* and *perſonal* property are undiſtinguiſhed in the laws of the *Arabs*) according to certain rules derived from three ſources, the *Korán*, the genuine ſyſtem of oral traditions from the legiſlator, and thoſe opinions in which the learned and orthodox have generally concurred *: the order, and proportions, in which the property of AMRU or HINDA muſt be diſtributed, conſtitute the principal ſubject of the work, which we have undertaken to explain.

1. The firſt claſs of *heirs* are they, who may be called *ſharers*, becauſe a certain *ſhare* of the eſtate is expreſsly allotted to each of them in the *Korán*, and particularly in the *fourth* chapter of it.

2. Next come they, who may be diſtinguiſhed by the name of *reſiduaries*, becauſe they take the *reſidue* after the *ſhares* have been duly diſtributed; and they are of two ſorts, reſidu-

* Page 213.

aries by *conſanguinity* and reſiduaries for *ſpecial cauſe*, the former of whom are preferred in the order of ſucceſſion; the latter are the maſters or miſtreſſes of enfranchiſed ſlaves, or their *male* reſiduary heirs. If no *ſharers* be living, the *reſiduaries* take the whole; but, if there be ſharers *by conſanguinity* and no reſiduaries, a farther portion of the inheritance *reverts* to them, though never to the widower or to the widow, while any heirs by blood are alive.

3. On failure of the two preceding claſſes, the diſtribution is made among thoſe *next of kin*, who are neither *ſharers* nor *reſiduaries:* they may be called the *diſtant kindred.*

4. Should none of the diſtant kindred be living and capable of inheriting, the eſtate goes (unleſs there be a widow or a widower, who is firſt entitled to *a ſhare)* to him, who may be called the *ſucceſſor by contract*; and of that ſucceſſion it is neceſſary to give an example: if AMRU, a man of an unknown deſcent, ſay to ZAID, "Thou art my kinſman, and ſhalt be "my ſucceſſor after my death, *paying for me* any "fine and ranſom, to which I may become "liable," and ZAID accept the condition, it is a valid contract by the *Arabian* law; and, if ZAID alſo be a man whoſe deſcent is unknown, and make the ſame propoſal to AMRU, who likewiſe accepts it, the contract is mutual and

ſimilar, and they are *ſucceſſors by contract* reciprocally.

5. If no ſuch agreement had been made, but if AMRU in his life time had acknowledged ZAID, a man of an unknown pedigree, to be his *brother* or his *uncle*, that is, to be related to him by his *father* or by his *grandfather*, though in truth he had no ſuch relation, and the bare acknowledgment of AMRU cannot be admitted as a proof of it, yet, if AMRU die without retracting his declaration, ZAID is called *the acknowledged kinſman by a common anceſtor*, and ſtands in the *fifth* claſs of ſucceſſors, but takes the eſtate before the general diviſee.

6. Laſt of all comes the perſon, to whom the deceaſed had left the whole of his property by a will duly made and proved; for, though the law ſecures to his heirs of the five preceding claſſes *two thirds* of his eſtate, yet it ſo far reſpects his *dominion*, while he lived, over his own property, and his *will* as to the diſpoſal of it after his deceaſe, that it will rather give effect to an intention not ſtrictly conformable to law (for the *Korân* ſeems to allow *pious bequeſts* only), than ſuffer his eſtate to eſcheat; which muſt be the conſequence of his dying without a repreſentative. All ſuch eſcheats to the ſovereign go towards a fund for charitable uſes; and according to the ſyſtem of ZAID, the ſon of THA-

BIT, which has been ſhortly explained in a former publication, that fund, if it be *regularly eſtabliſhed*, is entitled to the whole eſtate on failure of reſiduary heirs, without any *return* to the ſharers, and to the entire excluſion of the *four* laſt claſſes; but this doctrine ſeems quite exploded.

BEFORE we proceed to the law of *ſhares*, it is proper to take notice of the four impediments to ſucceſſion; which are ſlavery, homicide, difference of religion, and difference of country, or of allegiance; the laſt of which diſabilities relates only to ſuch as are not *Muſſelmans*.

1. Slavery, by the *Mohammedan* law, is either *perfect* and *abſolute*, as when the ſlave and all, that he can poſſeſs, are wholly at the diſpoſal of his maſter, or *imperfect* and *privileged*, as when the maſter has promiſed the ſlave his freedom on his paying a certain ſum of money by eaſy inſtalments, or, without any payment, after the death of the maſter: a female ſlave, who has borne a child to her maſter, is alſo *privileged*; but in both ſorts of ſlavery, as long as it continues, the ſlave can acquire no property, and conſequently cannot inherit. The *Arabian* cuſtom of allowing a ſlave to cultivate a piece of land, or ſet up a trade, on his own account, ſo that he may work out his manu-

miſſion by prudence and induſtry, and by degrees pay the price of his freedom, may ſuggeſt an excellent mode of enfranchiſing the black ſlaves in our plantations, with great advantage to our country and without loſs to their proprietors.

2. Homicide is either *with malice prepenſe* and puniſhable with *death*, or *without proof of malice*, and *expiable* by redeeming a *Muſelman* ſlave, or by faſting two entire months, and by paying the price of blood; or, thirdly, it is *accidental*, for which an expiation is neceſſary. *Malicious homicide*, or *murder* (for, by the beſt opinions, the *Arabian* law on this head nearly reſembles our own) is committed, when a human creature is unjuſtly killed with a weapon, or any dangerous inſtrument likely to occaſion death, as with a ſharp ſtick or a large ſtone, or with fire, which has *the effect*, ſays KA'SIM, *of the moſt dangerous inſtrument*, and, by parity of reaſon, with *poiſon* or by *drowning*; but thoſe two modes of killing are not ſpecified by him; and there is a ſtrange diverſity of opinion concerning them: killing *without proof of malice* is, when death enſues from a beating or blow with a ſlight wand, a thin whip, or a ſmall pebble, or with any thing not ordinarily dangerous: *accidental death* is, when it was neither deſigned nor could have been prevented

by ordinary care, as if AMRU were to ſhoot an arrow at a wild beaſt, and the arrow by accident were to kill ZAID, or if MAZIN were to fall from his terrace upon ZUHAIR and kill him by his fall; in which caſes the ſlayer would not be permitted to inherit *from the ſlain*. If, however, a man were to dig a pit, or fix a large ſtone, on the field of another, and the owner of the field were to be killed by falling at night into the pit, or running againſt the ſtone, the doer of the illegal act, which was the primary *occaſion* (but not the *cauſe*) of the death, muſt pay the price of blood, but would not, it ſeems, be diſabled from ſucceeding to the property of the deceaſed, whom he could not in ſtrictneſs be ſaid to have killed.

3. An unbeliever ſhall never be heir to a believer, nor converſely; but infidel ſubjects may inherit from infidels.

4. The difference between two ſtates or countries conſiſts in the difference of ſovereigns, by whom protection is given to their reſpective ſubjects, and to whom allegiance is reſpectively due from them: this difference is particularly marked between a country governed by a *Mohammedan* power and a country ruled by a prince of *any other religion*; for they are always, virtually at leaſt, in a ſtate of warfare, the firſt being called by lawyers *the ſeat of peace*,

and the ſecond, *the ſeat of hoſtility*. A difference of country, therefore, which excludes from the right of inheriting, is either *actual* and *unqualified*, as when an *alien enemy* reſides in the *ſeat of hoſtility*, or when an alien has choſen his domicil in the *ſeat of peace*, and pays the tribute exacted from infidels, in which caſe the *tributary* ſhall not be heir to the *alien enemy* dying abroad, nor converſely, becauſe each of them owed a ſeparate allegiance; or the difference is *qualified**, as when a *fugitive* enemy ſeeks quarter, and obtains a temporary reſidence in the *ſeat of peace*, or when two alien enemies are fugitives from two different hoſtile countries: now, although the *tributary* and the *fugitive* actually live in the ſame kingdom, yet, ſince the fugitive continues a ſubject of the hoſtile power, he remains, *as it were*, under a different government, and there is no mutual right of ſucceſſion between him and the tributary; nor, by ſimilarity of reaſon, between *two fugitives*, who leave two diſtinct hoſtile governments, and obtain quarter for a time in the land of believers, but without any intention of making it their conſtant abode.

If none of theſe four incapacities preclude the heirs of Amru from the legal ſucceſſion to his eſtate, which we will ſuppoſe already ſold and

* Page 215.

reduced to money of one denomination, the magiſtrate, or his officer, muſt proceed to the diſtribution of the *ſhares*; and, as they are a *moiety*, a *fourth*, an *eighth*, two *thirds*, one *third*, and a *ſixth*, of the aggregate ſum, it will be convenient at firſt to conſider that ſum as conſiſting of *twenty-four* equal parts, ſo that the ſhares will be, in whole numbers, *twelve*, *ſix*, *three*, *ſixteen*, *eight*, and *four*.

THE *ſharers* are *twelve* perſons, *four* males and *eight* females; but, before we ſpecify their reſpective allotments, it is neceſſary to premiſe that a *grandfather* and a *grandmother*, according to the *Arabian* idiom, ſignify a *male*, and a *female*, *anceſtor* in any degree; that a *true* grandfather is he, between whom and the deceaſed no female anceſtor intervened; that a *falſe* grandfather is, where the paternal line of aſcent was broken by the intervention of a female; and that a grandmother alſo is called *true*, when no *falſe grandfather* intervened between her and the deceaſed: in ſhort, the only *true line of anceſtry*, according to the *Arabs*, is an uninterrupted ſucceſſion of *paternal* forefathers. The *male* ſharers then are the *father*, the *true grandfather*, the *brother by the ſame mother* only, and the *widower*: the females are the *widow*, the *daughter*, the *female iſſue of the ſon*, the *ſiſter of the whole blood*, the *ſiſter by the ſame father* only,

the *ſiſter by the ſame mother* only, the *mother* herſelf, and the *true grandmother*.

We begin with the *males* in the order of the ſhares before enumerated; and, 1. The father of AMRU or HINDA takes * a *ſixth* abſolutely, though a *ſon* of the deceaſed be living, or any male deſcendant, who claims wholly through males; but, if there be no ſuch male deſcendant, he becomes *a reſiduary heir*; and, if there be only a *daughter* of the deceaſed, or a *female* deſcendant from the ſon, he firſt has his legal ſhare, or a *ſixth*, and, when her ſhare alſo has been allotted, he claims the reſidue. 2. The true grandfather is excluded from any ſhare by the living father, *through whom* alone the grandfather bore a relation to the deceaſed; and, although a ſimilar reaſon might afterwards be applied to the mother, and operate to the excluſion of her children, yet the father has the additional ſtrength of a double title, both as a *ſharer* and a *reſiduary*: but, if the father alſo be dead, *his* father, or true paternal anceſtor, has exactly the ſame intereſt, except in four caſes, which will be preſently mentioned. 3. A ſingle half-brother, by the ſame mother only, takes a *ſixth*, and two or more ſuch half-brothers, a *third*; provided that the deceaſed

* Page 216.

left neither children, nor male iſſue of a ſon, nor a father, nor a true grandfather; by any of whom the brothers by the ſame mother are excluded; and this article brings us neceſſarily to one claſs of *female* ſharers; for, *in this inſtance*, there is no diſtinction of ſex; both brothers *and ſiſters* by the ſame mother only having an equal right and an equal ſhare in the diſtribution. 4. A *moiety* of HINDA'S eſtate, if ſhe die without children, or the iſſue of a deceaſed ſon, goes to her widower AMRU, who, if ſhe leave ſuch iſſue, has no more than a *fourth*.

As examples of the father's rights, let us ſuppoſe AMRU to have died worth two thouſand four hundred pieces of gold, leaving his father ZAID, and either a ſon or a ſon's ſon, OMAR: in this caſe the *four hundred* pieces are the ſhare of ZAID, and OMAR takes the remaining two thouſand; but, if AMRU leave only his father ZAID and either a daughter, or ſon's daughter, LAILA, the father is firſt entitled to the *four hundred* pieces, or *ſixth* part; and, after LAILA has received *twelve* hundred, or a moiety of the eſtate (which, as we ſhall ſee, is her *ſhare* in this caſe), he takes, as *reſiduary*, the *eight* hundred pieces, which remains; ſo that the property of AMRU is equally divided between them. Should no relation be left but ZAID the father, and LEBID the brother, of the

deceaſed, LEBID is excluded; and the whole eſtate goes to ZAID. If, in the three preceding caſes, the paternal grandfather SALIM had been left inſtead of ZAID, his rights would have been preciſely the ſame; and the only difference between ZAID and SALIM will appear from the four following examples. 1. The paternal grandmother would be excluded by ZAID her ſon, but not by his father, her huſband, SALIM. 2. If AMRU or HINDA leave a father ZAID, a mother SOLMA, and a widow ZAINEB, or widower HARETH, the mother takes a *third* part of what remains after ZAINEB or HARETH has received the legal ſhare; but, if SALIM be ſubſtituted for ZAID, ſhe would have a right to a third of the *whole aſſets*, according to the prevailing opinion, although ABU YUSUF thought her entitled, even in that caſe, to no more than a third of *the remainder*. 3. The brothers of the whole blood, and thoſe by the ſame father only, are excluded from the inheritance by ZAID the father, but not by the grandfather SALIM, as the beſt lawyers agree, diſſenting on this point from their maſter ABU HANIFAH. 4. If AMRU had manumitted his ſlave YASMIN, and died, leaving his father ZAID and a ſon OMAR, a *ſixth* part

of the right of ſucceſſion to YA'SMÌN would have veſted, according to AB'U YU'SUF, in ZAID, but, if the paternal grandfather SA'LIM had been left inſtead of the father, the whole intereſt would have veſted in the ſon: in this caſe that illuſtrious lawyer ultimately diſſented from his maſter and from his fellow-ſtudent MUHAMMED, who were both very juſtly of opinion, that, whether ZAID or SA'LIM were alive on the death of the manumittor, the whole right of ſucceſſion to the manumittee veſted in OMAR.

Let us proceed to the ſhares of the *females*; and 1. If AMRU die without children, and without any iſſue of a deceaſed ſon, his widow HINDA muſt receive a *fourth* of his aſſets; but her ſhare is an *eighth* only *, if any ſuch iſſue be living: ſhould he leave more widows than one, they take equal parts of ſuch *fourth* or *eighth*; ſo that the legal ſhare of the widower is always in a double ratio to that of the widow or widows: as, if HINDA die worth *twenty-four* thouſand zecchins, her ſurviving huſband AMRU muſt be entitled either to *twelve* or to *ſix* thouſand; and if AMRU die with the ſame eſtate, his widow HINDA muſt have either *ſix* or *three* thouſand for her ſole ſhare; or, if ZAINEB and ABLA had alſo been legally married to AMRU, the three widows muſt receive

* Page 217.

either *two* or *one* thouſand zecchins each, as the caſe may happen. 2. *One daughter* takes a moiety, and *two* or *more* daughters have *two thirds*, of their father's eſtate; but, if the deceaſed left a ſon, the rule, expreſſed in the *Koràn*, is this: "to one male give the portion of two "females;" and the daughters in that caſe are not properly *ſharers*, but *reſiduary heirs* with the ſon, their part of the inheritance being always in a ſubduple ratio to his part. Thus, if AMRU die worth *twenty-four* thouſand pieces of gold, his only child FATIMA takes twelve thouſand as her *ſhare*; but, if ſhe have three ſiſters, AZZA, LATI'FA, and ZUBAIDA, two thirds of the aſſets, or *ſixteen* thouſand pieces, are equally divided between the four girls; and if there be a ſon OMAR, he muſt receive, in the firſt caſe, *ſixteen* thouſand, while FA'TIMA has *eight*; and, in the ſecond, *eight* thouſand, while ſhe and her ſiſters take each *four* thouſand, pieces. 3. If OMAR had died before his father, leaving female iſſue, and his father had then died without any daughter of his own, the daughters of OMAR would have had preciſely the ſame ſhares, to which thoſe of AMRU himſelf would have been entitled; but, had FA'TIMA been living, ſhe would have taken *half* the eſtate, or *twelve* thouſand pieces of gold, and a *ſixth* only, or *four* thouſand, the complement of *two thirds* or *ſixteen* thouſand, would have

been equally diſtributed among her nieces. Had FA'TIMA and AZZA been at that time alive, they would have taken their legal ſhare, to the excluſion of their brother's *female* iſſue, unleſs the right of that iſſue had been ſuſtained by a *male* in an *equal*, or a *lower* degree, who would have made them *reſiduaries*, "the *male* "taking, by the rule, the portion of females;" but a male in a *higher* degree would not have given them that advantage; and, if OMAR himſelf had ſurvived, his daughters would have been wholly excluded. The *ſix* caſes, therefore, or different ſituations, of the female iſſue of OMAR may be thus recapitulated: 1. A ſingle female takes a *moiety*. 2. Two or more have *two thirds*. 3. A *male* in the ſame, or a lower, degree than themſelves, gives them a *reſiduary* right in a ſubduple ratio to his own. 4. With a daughter of AMRU, who is entitled to *half*, they would have only a *ſixth*, to make up the regular ſhare of the female iſſue. 5. They are excluded, if AMRU left more daughters than one, but no male iſſue in any equal, or a *lower*, degree. 6. A ſon alſo of AMRU wholly excludes them. In the three firſt caſes, their legal claims correſpond with thoſe of daughters: but in the three laſt their rights are weaker, becauſe they are in a remoter degree from the deceaſed.

The pedigree exhibited in the text* is called by the *Arabs* the *taſhbîb*, becauſe, in their opinion, it ſharpens the underſtanding, and captivates the fancy as much as the *compoſition of an elegant love-poem*, which the word literally ſignifies; but, without adopting ſo wild a metaphor, we may truly ſay, that it is very perſpicuous, and that no comment, after what has been premiſed, could render it clearer. An example, however, will ſhow more diſtinctly than an abſtract rule, in what manner an eſtate is diviſible, when a *male* deſcendant gives a *reſiduary* title to a *female* in the ſame, or in a *higher*, degree. Call the only ſurviving male deſcendant OMAR, and ſuppoſe him to be the brother of AMINA, who ſtands loweſt in the firſt ſet of females: here the higheſt female in that ſet muſt receive a *moiety* of the aſſets; the next below her takes a *ſixth* together with the higheſt of the ſecond ſet, as the complement of *two thirds*; and the *reſidue* muſt be divided into *five* portions, of which OMAR claims *two* and each of the females in the ſame degree, one; but the three females below them are excluded. If OMAR be the brother of ZARI'FA, whom we ſuppoſe the loweſt of the middle ſet, the remaining *third* of the eſtate muſt be diſtributed in *ſeventhſ*,

becauſe there are *five* females, *three* in a higher, and *two* in an equal, degree with OMAR, who muſt always have a double portion; and, if he be the brother of UNAIZA, the loweſt female of the *third* ſet (who, on the former ſuppoſition, would have been excluded), there will be *ſix* female *reſiduaries* entitled to portions with OMAR, but in a ſubduple ratio; ſo that, if AMRU died worth *twenty-four* thouſand ducats, the daughter of his ſon takes *twelve* thouſand of them; the two daughters of his ſons' ſons receive each *two* thouſand; and, the reſidue being *eight*, OMAR is entitled alſo to *two* thouſand ducats, while UNAIZA and the *five* women, who remain, have each *one* thouſand, which they owe to the fortunate exiſtence of OMAR. 4. * The rights of ſiſters by the ſame father and mother, and (5.) thoſe of ſiſters by the ſame father only, are explained in the text with ſufficient clearneſs, but it is proper to obſerve, that the *fifth* caſe of the firſt claſs is compriſed in the *ſeventh* caſe of the ſecond; and that (6.) the ſiſters by the ſame mother have been mentioned in a former ſection. There will be no uſe in repeating the ingenious arguments of IBNU ABBAS in ſupport of his diſſent on many points from other old lawyers, nor the

* Page 219.

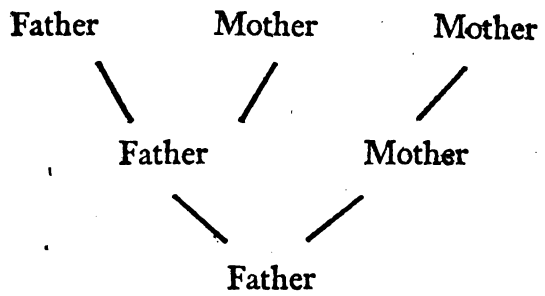
ſolid anſwers, which have been given to his objections; but a ſtory, told by SHARIF, may here be repeated, becauſe it conveys an idea of the traditionary *Arabian* law, and ſhows from what ſources our excellent author derived his doctrine: 'HUDHAIL uſed to relate, that ABU 'MUSA, being conſulted on the diſtribution of 'an heritage among a *daughter*, a ſon's *daugh-* 'ter, and a *ſiſter*, anſwered, *the firſt muſt have* 'a *moiety; the ſecond a ſixth; and the third,* 'what remains; but "Conſult IBNU MASUUD, "added he, and apprize me of his anſwer:" 'when IBNU MASUUD, was conſulted, he ſaid, 'that he was preſent, when MUHAMMED him-'ſelf gave the ſame deciſion;' and, when that anſwer was reported to ABU MUSA, he ſaid, "you muſt put no queſtions to me, as long as "that illuſtrious lawyer remains with you."

7. * Although the different rights of the mother in different caſes be very clearly explained, yet her title to *a third of the reſidue* may be illuſtrated by two examples: firſt, if ADHRA leave only her huſband WÂMIK, her mother SÔÂDA, and her father MÂZIN, half of her eſtate goes to WÂMIK, a third of the other half, or a ſixth of the whole, to SÔÂDA, and the remainder to

* Page 220.

MA'ZIN; but, ſecondly, if WA'MIK leave only his wife ADHRA, his mother ZAINEB and his father LEBID, the widow takes a quarter of his property, while ZAINEB has a third, and LEBID two thirds, of the remaining three quarters.

8. In giving an example of the diviſion between two great grandmothers *, we may anticipate in ſome degree the arithmetical part of the work, which will be found extremely clear and ingenious. The pedigree exhibited by SHARI'F is in this form:



Now the paternal grandmother's mother, and the mother of the paternal grandfather, are together entitled to a ſixth, and the paternal grandfather's father to the reſidue, of the eſtate, which ought, by the general rule, to be divided into *ſix* parts, becauſe ſix is the denominator of the ſhare; but, to avoid a fraction, we muſt

* Page 221.

obſerve the proportion of *one*, or the ſixth part, to *two*, or the number of perſons entitled to it; and, ſince *one* and *two* are *prime* to each other, we muſt multiply *two* into *ſix*, and the product is the number of parts into which the property muſt be divided; ſo that of *twelve* cows or horſes the great grandfather will have *ten*, and each of the great grandmothers, *one*.

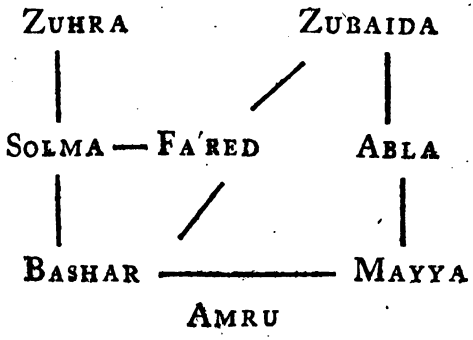
The great grandfathers are called anceſtors in the *ſecond*, and their fathers, anceſtors in the *third*, degree, and ſo forth; and it muſt be remarked that in theſe tables the number of *female* anceſtors, who inherit with the *males*, is equal to the number of ſuch degrees: thus in the following,

F M M M
F M M
F M
F

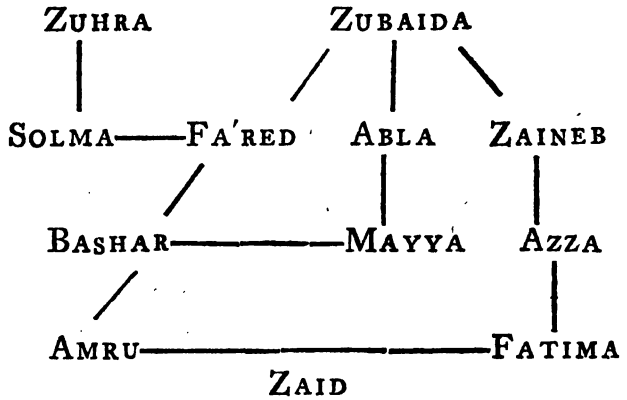
there are *three* great great grandmothers, and the eſtate muſt be divided into *eighteen* parts, becauſe one and three are prime to each other. We ſuppoſe in both pedigrees, that the higheſt line only are left by the deceaſed AMRU; for, by the text, *the neareſt female anceſtor excludes the more diſtant*; and, if he leave his father ZUHAIR, and his paternal grandmother AZZA, with LAHA his maternal grandmother's mother,

ZUHAIR takes the whole inheritance; for he excludes AZZA, and ſhe, being nearer in degree, excludes LAILA.

Let us conclude the ſubject with a caſe put by SHARIF in illuſtration of the pedigree in the text: ZUBAIDA gave her daughter's daughter MAYYA in marriage to her ſon's ſon BASHAR, and the young pair had a ſon AMRU, who acquired an eſtate, and died: now ZUBAIDA was both paternal and maternal great grandmother of AMRU, and had, therefore, a *double* relation to him; but another woman, named ZUHRA, had married her daughter SOLMA to FARED, who was the ſon of ZUBAIDA, brother of ABLA, and father of BASHAR; ſo that ZUHRA was AMRU's paternal grandmother's mother, and had only a ſingle relation; as it will appear by the following arrangement of the family:



The caſe of a *triple* relation will be no leſs evident from the following pedigree:



For, if AMRU, whom in the former caſe we ſuppoſed to be dead without iſſue, had lived and married his couſin FATIMA, by whom he had a ſon ZAID, who died leaving property, ZUBAIDA would have a *triple* relation to the deceaſed; firſt, as his maternal great grandmother's mother; ſecondly, as his paternal grandmother's grandmother; and thirdly, as the mother of his paternal great grandfather; but ZUHRA has only a *ſingle* relation to ZAID, as grandmother of his paternal grandfather BASHAR.

In both theſe caſes a *ſixth* of the aſſets is divided *equally* between the *two* female anceſtors, by the opinion of ABU YUSUF, and, according to one authority, by that of his great maſter alſo; but his fellow-ſtudent MUHAMMED (whoſe arguments, and the anſwers to them, it is needleſs to add) contended, that

ZUBAIDA would be entitled in the firſt caſe to *two-thirds*, and in the ſecond, to *three-fourths*, of that *ſixth* part, according to the number of modes, in which ſhe was related to AMRU or ZAID.

No comment could add perſpicuity to the chapter on *reſiduary heirs* *, until we come to the caſes of inheritance from enfranchiſed ſlaves †, where a ſhort elucidation of the text appears neceſſary. If AMRU enfranchiſe NERGIS, and die, leaving a ſon BECR, and a daughter LAILA; then, on the death of NERGIS without *reſiduary* heirs by blood, his property goes wholly to BECR, and LAILA, by the traditionary rule, takes nothing; but, ſuppoſe LAILA herſelf to manumit her black ſlave, SUSEN, who then purchaſes a ſlave MISC, and gives him freedom; and ſuppoſe SUSEN firſt, and MISC afterwards, to die without reſiduary heirs, in this caſe the eſtate of MISC goes to LAILA; nor would there be any difference, if the two manumiſſions had been conditioned to pay a certain ſum of money at a certain time. The caſe of a manumiſſion promiſed on the death of the miſtreſs, has rather more difficulty; but an example will make it clear: LAILA promiſes NERGIS, that, on her death, he ſhall

* Page 222. † Page 225.

be free; but, by the perſuaſion of a *Chriſtian* friend, ſhe renounces her faith, and ſeeks refuge in a hoſtile country: now *a believer cannot be the ſlave of an infidel*; and the *Mohammedan* judge pronounces accordingly, that NERGIS has gained his freedom; but LAILA, repenting of her apoſtaſy, returns to her native country and her former belief; after which NERGIS dies without heirs: LAILA ſucceeds as reſiduary to her promiſee, as ſhe would have ſucceeded to a ſlave of NERGIS purchaſed after the deciſion of the judge, if a ſimilar promiſe of manumiſſion at his death had been made by the maſter; and if that ſecond promiſee had died without heirs after her repentance and return. Should CÁFÚR, a ſlave of LAILA, marry, with her conſent, MERJÁNA, the freedwoman of AMRU, the ſon of that couple would be born free, becauſe, in reſpect of freedom or ſlavery, *a child has the condition of its mother*, and he bears a relation to AMRU her manumittor; but ſhould LAILA give CÁFÚR his freedom, he would *draw* that relation from AMRU, through himſelf, to LAILA, ſo that ſhe would ſucceed to the ſon of CÁFÚR and MERJÁNA, if he died after his parents and without other heirs of the firſt or ſecond claſs: the caſe would be ſimilar, if CÁFÚR being enfranchiſed, had

bought a ſlave MISC, and given him in marriage to the freedwoman of ZAID; for, if the iſſue of that marriage had been a ſon, born free, but with a relation to ZAID, and if CÁFÚR had then given MISC his liberty, he would have *drawn* from ZAID the relation of his freedman's child, and transferred it, through himſelf, to LAILA his former miſtreſs. This doctrine of a *relation* (as the *Arabs* call it) firſt *veſted* through the mother and then *deveſted* through the father, is founded on a deciſion of OTHMÁN in the caſe of ZUBAIR and RAFI.

We had occaſion before, to mention the difference (according to ABU YUSUF) between the *father*, and the *grandfather*, of the manumittor in regard to their ſucceſſion, with his *ſon*, to the property of a freedman; nor can any thing of moment be added here; but it will be proper to explain at large the concluding caſe in the chapter of *reſiduaries*, which proves, that the relation of enfranchiſement may ariſe by the *act of law* as well as by the *act of the party*. Let it be premiſed, that marriage is prohibited between kindred of two claſſes; firſt, between all thoſe in aſcending or deſcending lines of conſanguinity, who are called *near*; ſecondly, between brothers and ſiſters, and their iſſue, or between nephews or nieces and aunts or uncles, paternal

or maternal, who are called *intermediate*; but, between thoſe of the third, or *diſtant*, claſs, as the firſt or other couſins, there is no prohibition: now, if AMRU or HINDA purchaſe a kinſwoman or kinſman within either of the *prohibited* degrees, the ſlave becomes inſtantly free, and a right of ſucceſſion veſts in the purchaſor, though the maſterſhip began and ended in one moment. Call the three daughters of HARETH a ſlave, ZUBAIDA, SAFIYA, AMINA, who derived freedom from their mother, and two of whom, the firſt and third, purchaſe HARETH for fifty pieces of gold: he becomes in that inſtant free; and, if he die leaving property, two thirds of it go to his three daughters as their legal ſhares, and the reſidue belongs to the two, who procured him liberty; three fifths of it to ZUBAIDA, who contributed her *thirty*, and two fifths to AMINA, who added her *twenty*, pieces. To arrange the diſtribution without fractions, begin with *three*, the denominator of the legal ſhare: now *two*, its numerator, is *prime* to the number of ſharers; and *one* is prime alſo to *five*, the number of reſiduary portions; but *thirty* and *twenty* are *compoſed* to one another, ſince *ten* meaſures thirty by *three* and twenty by *two*; and *five*, the ſum of thoſe tenths, may be conſidered as ſtanding in the place of the

number of reſiduaries: again, *five* and *three* are prime to each other, and their product is *fifteen*, which, being multiplied into *three*, the firſt-mentioned denominator, produces *forty-five*, the number of equal parcels, into which HARETH's eſtate muſt be divided; ſo that *thirty*, or *two thirds*, may be diſtributed in *tens* to the three daughters, and *fifteen* or the reſidue, in *threes* to the *two*, who redeemed their father; ZUBAIDA taking in all *nineteen*, AMINA *ſixteen*, and SAFIYA, only *ten*, portions of the inheritance. This is the calculation of SHARIF, and the grounds of it will preſently appear; but the operation might have been ſhortened thus: multiply the denominator of the *legal ſhare* into the number of ſharers, and then multiply the product into the denominator of the *reſiduary portions*.

The chapter of *excluſion** is very perſpicuous; but the caſe of an *unbelieving* heir having really occurred in the time of ALI, we may inſert it as a monument of early *Arabian* juriſprudence. SOLMA had embraced the new faith, and died, leaving her huſband, and two brothers by the ſame mother, who were all three believers, with a *ſon*, who continued an infidel: on a diſpute concerning the inheritance, ALI and ZAID

* Page 225.

gave a moiety to the widower, conſidering the ſon as actually *dead*, a third to the half-brothers, and the reſt to ſuch of the reſiduaries as believed in the *Korán*; while IBNU'L MASUUD inſiſted, that the ſon was *dead* as to the right of inheriting, but alive as to the power of excluding, and thought that he drove the widower from *a moiety* to a *fourth part* only of SOLMA's eſtate; but the former opinion has prevailed, and in a curious book (for which there muſt have been abundant materials) entitled *The Diſſenſions of the Learned*, it is admitted, that, by univerſal aſſent, if AMRU leave a father, who is either a ſlave or an infidel, and a paternal grandfather, who is both free and a believer, the father is conſidered as *dead in law* to all purpoſes, and the grandfather is heir to AMRU.

We come now to the *Arabian* method of aſcertaining the ſmalleſt number of *parcels*, into which an eſtate can be divided, ſo as to avoid fractions in the legal diſtribution of it: that *number* we call the *denominator*, or deviſor, of the *eſtate*, though the *Arabick* word mean literally *the place of coming out*; and the problem is eaſily ſolved by the following rules: if the two numbers in queſtion be prime, multiply one of them into the other; if they be *compoſit* to each other, multiply the *meaſure* of one into the ſecond, and the product will be the number

ſought. The whole ſection * is as clear as it could be made in a verbal tranſlation; and it would be ſuperfluous to add examples of all the caſes, which muſt occur to every one, who has attentively peruſed the preceding parts of the work.

A caſe, which aroſe in the reign of OMAR, has given occaſion to ſome debate †: LAILA died, leaving only AMRU her huſband, HINDA her mother, and ABLA her ſiſter of the whole blood. Now the huſband and ſiſter were each entitled to a moiety, and the mother, to a third, of LAILA's property, which, by the rule then eſtabliſhed, could be divided into *ſix* parts only; but ABBAS, a companion of MUHAMMED, being conſulted by the Caliph, propoſed, that the regular diviſor ſhould be ſo *increaſed*, that of *eight* parts AMRU and ABLA might each take *three*, and HINDA *two*. The ſon of ABBAS, whoſe opinions were always rather ingenious than ſolid, was preſent at the deciſion; but, fearing the bad temper of the Caliph, ſuppreſſed at that time his own ſentiments: he thought, that the *ſiſter*, having (as we have ſeen) a weaker right, ſhould bear the loſs, becauſe, *where different rights concur, the weakeſt invariably yields*; and he ſaid, that if an arithmetician

* Page 226. † Page 227.

could number the ſands, yet he could never make *two halves* and a *third* equal to a whole; but his opinion has never been adopted, becauſe, although the *ſiſter* may in ſome caſes be removed into a diſtinct claſs of heirs, yet, with a huſband and a mother of the deceaſed, her ſhare is fixed by poſitive law, and ſhe cannot by any means be deprived of it; ſo that the ſhares of all the claimants muſt be diminiſhed in *exact proportion*; for inſtance, if the property had been *twenty-four* pieces of gold, the mother would claim *eight*, and each of the other heirs, *twelve*; now thoſe claims cannot all be ſatisfied, but eight is to twelve, as *ſix* to *nine*, which will be the reſpective ſhares, according to the deciſion of ABBAS.

Examples of the diviſor *ſix* increaſed to *ſeven* and to *nine*, or of *twelve* to *thirteen*, *fifteen*, and *ſeventeen*, would appear equally ingenious, but would ſwell this commentary to an immoderate ſize: there are two deciſions, however, deſerving particular notice, becauſe they were made in real cauſes, and have been univerſally approved. ZUBAIDA left her huſband ADNAN, with *two ſiſters of the whole blood*, two *ſiſters by the ſame mother only*, and the *mother* herſelf; whoſe legal ſhares, in order as they are mentioned, were a *moiety*, *two thirds*, *a third*, and *a ſixth:* it was impoſſible, therefore, to diſtribute them out of

thirty pieces, for inſtance, divided into *ſix* equal parcels; but the judge, named SHURAIH, divided the whole eſtate into *ten* parcels, each conſiſting of *three* pieces, and allotted them to the claimants in the proportion of their ſhares; that is, to the huſband, *three* parcels, to the ſiſters of the whole blood, *four*; to the half-ſiſters, *two*; and to the mother, *one*; aſſuring ADNAN, who at firſt complained of the judgement, that OMAR had made a ſimilar deciſion; and this caſe acquired celebrity among the *Arabs* by the name of SHURAIHIYYA. The next caſe, which was anſwered at once by ALI, while he was haranguing the people in the *mimbar*, or pulpit, at CUFA, is fully ſtated in the text: the ſhare of the widow was, regularly, an *eighth*; that of the daughters, *two thirds*; and that of each parent, a *ſixth*, all which cannot be diſtributed out of *twenty-four* parcels; but ALI pronounced, that the property of the deceaſed ſhould be divided into *twenty-ſeven* equal parts, of which the widow ſhould have *three*; the daughters *ſixteen*; and the two parents, *eight*. It is recorded, that, when the perſon, who conſulted ALI, was much diſſatisfied with his anſwer, and aſked *whether the widow was not legally entitled to an eighth*, the *Caliph* ſaid rapidly, "it is become a *ninth*," and proceeded in his harangue with his uſual eloquence.

The arithmetical part of the *Sirájiyya* * is very ſimple, and may be found in the firſt pages of all our elementary books; but the difference of the *Arabian* idiom occaſions a little obſcurity. The chapter on primes and meaſures is founded on a ſimple analyſis: when two numbers are compared, they are either equal or unequal; if unequal, either the ſmaller is an aliquot part of the greater, or they have a common meaſure, which muſt either be *unit* alone, or ſome *number*, which the *Arabs* define a *multitude compoſed of units*. When the greateſt common meaſure is found by the rule, they conſider the two numbers as *agreeing* in a fraction, which has that common meaſure for its denominator and unit for its numerator; but the nature of the *Arabick* language makes it impoſſible to expreſs in a ſingle word the fractions leſs than a *tenth*: thus *twenty-ſeven* and *twenty-four* agree, as they expreſs it, in a third; and a *third* of each number is called its *waſk*, or meaſure, as *nine* of twenty-ſeven, and *eight* of twenty-four. After this explanation of the word, which is tranſlated *the meaſure*, there will be no difficulty in the following caſes.

I. † AMRU leaves only his father and mother and ten daughters: now, by the rule, his eſtate

* Page 228. † Page 230.

ſhould be divided into *ſix* parts, becauſe the ſhare of each parent is a *ſixth*, and that of all the daughters *two thirds*; but *four* parts cannot be diſtributed, without a fraction, among *ten* perſons; for which reaſon we muſt multiply *five*, which is the meaſure of *ten*, into *ſix*, which is the firſt number of parcels, and the product *thirty* is the number of lots, into which the property of AMRU muſt in fact be divided; each of his parents taking *five* lots, and each of his daughters *two*.

II. HINDA leaves her huſband, both her parents, and ſix daughters; whoſe legal ſhares are a *fourth*, *two ſixths*, and *two thirds*, of the inheritance: now the regular denominator of the lots would be *twelve*, but it is raiſed to *fifteen*; and ſince *eight* parcels cannot be diſtributed equally among *ſix* daughters, the *meaſure* of ſix, or *three*, is multiplied by fifteen; ſo that of *forty-five* lots *nine* may go to the huſband, *twelve* to the parents, and *twenty-four* to the daughters, in exact proportion to their firſt diſtributive ſhares.

It will be very eaſy to apply the remaining rules to all the other examples given by SIRAJ'UDDIN*; but ſince, in the two laſt caſes, which are not likely to occur, the inheritance

* Page 230.

muſt be divided into 4320 and 5040 parcels, the calculation, after the *Arabian* mode, in words at length, would be inſufferably tedious, and the reader may make it in figures with little or no trouble. The latter of thoſe two caſes* is, however, ſubjoined; becauſe it will fully explain the ſection, in which no examples are given. SAAD leaves *two* wives, *ſix* female anceſtors, capable of inheriting together, *ten* daughters, and *ſeven* paternal uncles, whoſe ſhares of *twenty-four* (the *root*, as they call it, of this caſe) are *three*, *four*, *ſixteen*, and *one*; for the uncles can only take what the others leave. Now by obſerving the primes and meaſures, and working according to the rule, we come to 210, which muſt be multiplied by *twenty-four*, and the product gives the ſmalleſt number of parcels, into which SAAD's eſtate can be duly divided: the products of that multiplicand (210) by 3, 4, 16, give 630, 840, 3360, which are the allotments of the *wives*, *female anceſtors*, and *daughters*; and the allotment of each ſharer appears at once from the following proportions:

Persons.		*First Shares.*		MULTIPLICAND.		SHARES OF EACH.
2	:	3	::	210	:	531.
6	:	4	::	210	:	140.
10	:	16	::	210	:	336.

* Page 232.

The laſt act of the *Muſelman* judge is to make an actual diviſion of the ſtate*; and we will ſuppoſe that LAILA, in the caſe anſwered by by ABBAS, had left ZAINEB and ABLA, two ſiſters of the whole blood, with AMRU, her huſband, and HINDA, her mother; and that her property amounted only to *twenty-five* gold *mohrs*: now the *root* of the caſe is increaſed, as we have ſeen, from *ſix* to *eight*, which is prime to twenty-five; and the products of *two*, the ſhare of each ſiſter, of *three*, the ſhare of the huſband, and of *one*, the ſhare of the mother, multiplied by the number of gold *mohrs*, are 50, 75, and 25, which, divided by *eight*, give the following ſhares: to each ſiſter, 6 *mohrs*, 4 *rupees*; to AMRU, 9 *m.* 6 *r.*; to HINDA, 3 *m.* 2 *r.* Had LAILA's eſtate been *fifty* gold *mohrs*, the diſtribution would have been thus:

	M.	R.
ZAINEB, ...	12,	8.
ABLA, ...	12,	8.
AMRU, ...	18,	12.
HINDA, ...	6,	4.

It ſeems needleſs to give examples of the ſimple rules for aſcertaining the dividends of each *claſs*; but the paſſage concerning creditors,

* Page 233.

at the cloſe of the chapter, is made obſcure by extreme brevity, and requires a ſhort illuſtration. Suppoſe the aſſets of AMRU to be *nine* pieces of gold; his debts, *five* pieces to SAAD, and *ten* to AHMED; here the aggregate of the debts, *fifteen*, is compoſit to *nine*, and their *meaſures* are *five*, and *three*; ſo that, by the rule before-mentioned of diſtribution among *heirs*, AHMED will receive *ſix*, and SAAD, *three* pieces; but, had the debtor left *thirteen*, which would have been prime to the amount of both debts, then *fifteen*, ſtanding in the place of the *verification*, as they call it, muſt be the deviſor of the ſeveral products, ariſing from the multiplication of *ten* and *five* into thirteen, and the quotients $8\frac{2}{3}$ and 4_3 will be the reſpective dividends of AHMED and SAAD.

The practice of *ſubtraction* * aroſe from the caſe of ABDUR'RAHMAN and his four wives, decided in the reign of OTHMAN; and the ſection concerning it will be made clear by a fuller explanation of the example in the text. We have ſeen, that the widower is entitled to a *moiety*, the mother to a *third*, and the uncle, to the *reſidue*; ſo that, if LAILA's eſtate be divided into *ſix* parcels, the diſtribution may be made without a fraction: but if the widower agree to

* Page 234.

keep the *mahr*, or nuptial preſent to his wife, which he had never actually paid, inſtead of his *three ſixths* of the whole, the remainder, after deducting the *mahr*, muſt be divided into *three* parts, of which the mother will have *two*, and the uncle *one*. So, if the mother agree to take a jewel, or other ſpecifick thing, in lieu of her *two ſixths*; or the uncle, a ſlave or a carriage, in the place of his *ſixth* part, the remainder, which would be *four* parts in the firſt caſe, and *five* in the ſecond, muſt go to the other claimants in proportion to their ſhares. Again; if AMRU leave his mother FATIMA, two ſiſters by the ſame mother, LATIFA and SOLMA, and the ſon of a paternal uncle, SELIM; here alſo the inheritance muſt be divided, by the rule, into *ſix* parts: now, if the deceaſed left a female ſlave and thirty gold *mohrs*, and, if SOLMA conſented to keep the ſlave inſtead of her legal ſhare, or a *ſixth*, the remainder of the property muſt then be divided into *five* parcels, ſix gold *mohrs* in *each*, of which FATIMA and LATIFA muſt receive each *one* parcel, and SELIM, the *three* parcels, which remain. It is obvious, that, if the firſt calculation were made, in the preceding caſes, on a ſuppoſition, that the taker of the ſpecifick thing was dead or incapable of inheriting, there would be either a *defect* or an *ex-*

ceſs in ſome of the allotments to the other claimants.

There is no difficulty in the chapter on the *return**, except what ariſes from the *Arabick* idiom, to which the reader is probably by this time habituated; but it is neceſſary to remark, that, although, by the letter of the *Korán* and the ſtrict rules of law, no *return* can be made to the *widower* or *widow*, yet an equitable practice has prevailed, in modern times, of *returning* to them *on failure of ſharers by blood and of diſtant kindred.* The laſt caſe in the chapter can rarely occur; and the reſult of the calculation (which fills ten pages in the *Perſian* work of *Maulaví* KASIM) is, that, of 1440 parcels, the *four* widows take (36 × 5 =) 180; the *nine* daughters (36×28=) 1008; and the *ſix* female anceſtors (36×7=) 252; ſo that 45 parts go to each *widow*, 112 to each *daughter*, and 42 to each *female anceſtor.*

The rights of the *paternal grandfather* have been more diſputed than any other point of *Arabian* law; no fewer than *ſeventy* contradictory deciſions having been made concerning them in the reign of OMAR; but the diſpute is now ſettled among the *Sunnis* according to the opinion of ABU HANIFA; and the chapter on

* Page 235—237.

diviſion ſeems to have been inſerted merely from reſpect to ABU YUSUF and MUHAMMED, who diſſented on this point from their maſter*: it is one of the cleareſt chapters in the *Sirájiyyah*, and will be uſeful to us, if the queſtion ſhould ariſe in a family of *Shiâhs*, who follow, no doubt, the opinions of ALI and ZAID. The caſe called *acdariyya*, which was decided by the ſon of THABIT, and has acquired ſuch celebrity in *Irák*, that it is diſtinguiſhed among the lawyers of that country by the epithet of *alghárrà*, or the *luminous*, is a perſpicuous example of the grandfather's diviſion in a *double* ratio with the ſiſter: the conjecture, formerly hazarded by myſelf, that it was named *acdariyya*, becauſe the rules of inheritance are *diſturbed* by it in favour of the grandfather, had occurred, I ſee, to ſome *Arabs*, and is mentioned by SHARIF without diſapprobation.

It will be neceſſary to illuſtrate by examples the chapter on *ſucceſſion to veſted hereditary intereſts*†: and, firſt, we may ſuppoſe, that ZAID had two wives, named ZAINEB and LATIFA, and that ZAINEB died poſſeſſed of ſeparate property, leaving her huſband, her mother ZUHRA, and HINDA, her daughter by her former huſband: now the legal ſhares, in order as the

* Page 237—240. † Page 240—242.

ſharers are named, would be a *fourth*, a *ſixth*, and a *moiety*; ſo that regularly the eſtate ſhould be divided into *twelve* parts, but it is here divided into *four*, becauſe there muſt be a *return* to ZUHRA and HINDA, in the proportion of their ſhares, that is as *one* to *three*; but, when ZAID has taken his *fourth*, the *three* fourths, which remain, cannot be diſtributed in that proportion; and, ſince *three* and *four* are prime to each other, we therefore multiply *four*, conſidered as the number of perſons entitled to a return, into *four*, the denominator of the huſband's *ſhare*, and the ſquare number anſwers the purpoſe of integral diſtribution; for of *ſixteen* parcels ZAID will be entitled to *four*, ZUHRA to *three*, and HINDA to *nine*.

Suppoſe next, that ZAID himſelf dies, before any diſtribution actually made, leaving only LATIFA before-mentioned, his mother BASIRA, and his father ABID: here *four* parts of the former inheritance having veſted in him, the diſtribution is eaſy; *one* part going to LATIFA, as her *fourth*, one alſo to BASIRA, as her *third of the reſidue*, and *two* parts to ABID; in exact proportion to their ſeveral claims on his own eſtate.

Thirdly, ſuppoſe HINDA to die before any actual diſtribution, leaving the before-named

ZUHRA, her grandmother, ZUBAIDA her daughter, and two ſons, HA'TIF and BASHAR: now ſhe had a *veſted intereſt* in *nine* parts out of the *ſixteen*, and, her own eſtate being diviſible into *ſix* parts, we obſerve, that *nine* and *ſix* are compoſit to each other, or agree, as the *Arabian* phraſe is, *in a third*; ſo that a third of ſix, or *two*, muſt be multiplied into *ſixteen*, and the product *thirty-two* will be the denominator for both caſes; for of *thirty-two* parts *nine* will veſt in ZUHRA (*ſix* as mother to ZAINEB, and *three* as grandmother to HINDA), *twelve* in the two ſons, *three* in ZUBAIDA, and *eight* in ZAID's repreſentatives; ſince, to aſcertain the ſhare of each individual, the juſt-mentioned ſhares out of *ſixteen* muſt be multiplied by *two*, and thoſe out of *ſix*, by *three*, which is here called the *meaſure* of HINDA's veſted intereſt.

Let us fourthly ſuppoſe, that ZUHRA alſo dies before any diſtribution, leaving her huſband CA'AB, and two brothers CA'LIB and TA'RIF. Now her own eſtate is arranged by *four*, the huſband taking a *moiety*, and each of the reſiduaries *one fourth*; but *four* and *nine* are prime to each other; and *four*, therefore, multiplied by *thirty-two*, produces an *hundred and twenty-eight*, the denominator of both caſes: we muſt then multiply by *four* the ſhares out of *thirty-two*, and by *nine* the ſhares out of *four*,

and the products will be lots of the ſeveral claimants; *eight* parcels going to LATIFA, *ſixteen* to ABID, *eight* to BASIRA, *forty-eight* in moieties to HATIF and BASHAR, *twelve* to ZUBAIDA, *eighteen* to CAAB, and *eighteen* in moieties to CALIB and TARIF.

We need only add, that, although the concluſion of the chapter before us be obſcured by its extreme conciſeneſs, yet it plainly means, that, "when any number of heirs die ſucceſſively before the diſtribution, if the *ſhares* "*veſted* in the laſt deceaſed do not quadrate "with the *arrangement* of his own eſtate, we "muſt conſider all thoſe, who died before him, "as *one deceaſed heir*, and himſelf as the *ſecond*, "and then work by the preceding rules;" to give more examples would be very eaſy, but the reader would find them inſupportably tedious.

All controverſies on the claims of the *next of kin*, who are neither *ſharers* nor *reſiduaries*, are now at an end *; for it ſeems to be ſettled, that they ſucceed according to the order preſcribed in our text.

I. On the *firſt* claſs of diſtant kindred the doctrine of ABU YUSUF has far more ſimplicity

* Page 242, 243.

than that of MUHAMMED, in which there is an appearance of intricacy; but an attentive reader will find no difficulty in the caſe reduced to the form of a table, in which the loweſt of the ſix ranks are ſuppoſed to be the claimants of AMRU's eſtate *: he will ſee, that ABU YUSUF would divide that eſtate into *fifteen* parts, giving *one* to each of the female, and *two*, by the rule in the *Koràn*, to each of the male deſcendants; but that MUHAMMED would arrange it in *ſixty* parcels, *twenty-four* of which would go to the repreſentatives of the *three* ſons, and *thirty-ſix* to thoſe of the *nine* daughters; due regard being paid to the *double portion* of the male deſcendants, ſo as to bring the ſhares of the *twelve* claimants to the following order from the left hand, *twelve*, *eight*, *four*; *nine*, *three*, *ſix*; *ſix*, *two*, *four*; *three*, *two*, *one*. The correctneſs of this method has, it ſeems, obtained it a preference over that of ABU YUSUF, whoſe practice, however, is followed, on account of its facility, in *Bokhára* and ſome other places; although of the two different traditions from ABU HANIFA, that reported by MUHAMMED be the more publickly known and the more generally believed.

The reader would be unneceſſarily fatigued,

* Page 244, 245.

if we were to exhibit every ſtep of the arithmetical proceſs, by which the eſtate of AMRU muſt be diſtributed, according to the opinion of MUHAMMED, between his *great grandſon* by females only, and his *two great granddaughters*, who have the advantage of a male in the line of deſcent *; nor does the ſection concerning the difference of *ſides* require elucidation.

II. On the *ſecond* claſs, or the *grandfathers* and *grandmothers*, who are excluded from *ſhares*, we need only ſum up the doctrine of our author in the words of SHARIF;—"The degrees "in this caſe are either equal or unequal; if "*unequal*, the nearer is preferred; if *equal*, the "preference is given to the perſon claiming "*through a ſharer*; if there be an *equality* in "that reſpect, the *ſides* muſt be the ſame or dif-"ferent; if different, the diſtribution muſt be "made in *thirds*, the paternal ſide having a "*double* allotment; if *the ſame*, the *ſexes* of the "*roots*, or anceſtors, muſt agree, or not; if "they agree, the eſtate muſt be diſtributed ac-"cording to the perſons of the *branches*, or "claimants; if not, according to the *firſt* rank "that differs, as in the preceding claſs †."

III. There ſeems no difficulty in the chapter ‡ on the third claſs of diſtant kindred; but

* Page 247, 248. † Page 249. ‡ Page 250.

it muſt be remarked, that although the brothers and ſiſters by the ſame *mother only* take equally, according to the *Koràn*, without any diſtinction of ſex, yet that exception to the general rule by no means extends to the *iſſue* of ſuch brothers and ſiſters.

IV. Although the claims of *uncles* and *aunts*, in three caſes, be clearly explained in the text *, yet it may not be improper to ſubjoin an example from the commentary of *Maulavi* KÀSIM, which the following pedigree will make more intelligible than his dry ſtate of the caſe;

HINDA—AMRU—*Sulma*(—SUHAIL)—UMAR

LEBI'D *Zaineb* *Azza* BECR

ZAID.

AMRU, having had by HINDA a ſon, named LEBID, married SULMA, by whom he had a daughter, named ZAINEB: after AMRU's death, SULMA married SUHAIL, to whom ſhe produced AZZA, and after his death, ſhe married UMAR, by whom ſhe became the mother of BECR: now ZAID was the ſon of LEBID and AZZA; and he died, leaving no heirs but

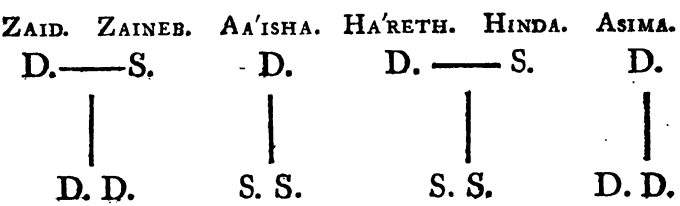
* Page 253.

BECR the brother, by the *ſame mother*, of his mother AZZA, and ZAINEB, who was his *paternal* aunt by the *ſame father* AMRU, and his *maternal* aunt by the *ſame mother* SULMA. In this caſe, the property of ZAID muſt be divided into *nine* parcels, of which the *paternal* aunt will have *two thirds*; and the remaining *third* will go to the *maternal uncle* and *aunt* in the ratio of *two* to *one*; ſo that ZAINEB, in her two characters, will be entitled to *ſeven ninths*.

There ſeems no neceſſity to expatiate on the *children of uncles and aunts*, or on the *couſins*, as we ſhould call them, in different degrees *; becauſe the text will be ſufficiently perſpicuous to thoſe, who perfectly underſtand the preceding ſections: but, ſince a curious caſe is put by SHARIF, I am unwilling to ſuppreſs it; eſpecially as it will throw light on the whole ſubject before us. The *father* of AMRU had a brother, ZAID, and two ſiſters, ZAINEB and AAISHA, by the ſame father only: his *mother* alſo had a brother, HARETH, and two ſiſters by the ſame father, named HINDA and ASIMA: firſt, his father and mother died; then, all his *uncles* and *aunts*, leaving the following iſſue: ZAID left two daughter's daughters, who were alſo the daughters of ZAINEB's ſons; AISHA, two ſons

* Page 255.

of her daughter; HA'RETH, two daughter's ſons, who were alſo the ſons of the ſon of HINDA; and ASIMA, two daughter's daughters; as in this pedigree:



AMRU himſelf afterwards died, with no heirs but the *grandchildren* of his uncles and aunts: In this caſe ABU YUSUF would have divided the inheritance into *thirty* parts; *twenty* for the *paternal* ſide; that is, *five* for each of the ſons, and as many for each of the daughters, who have a double relation; and *ten* for the *maternal* ſide, or *four* for each of the ſons, who are doubly related, and *one* for each of the daughters: but MOHAMMED, having divided AMRU's eſtate into *thirty-ſix* allotments, would have given *twenty-four* to the paternal, and *twelve* to the maternal ſide; that is, *ſix* to each of ZAID's granddaughters, as ſuch, and *four* to each of them, as granddaughters of ZAINEB; *two* to each of AAISHA's grandſons; *three* to each grandſon of HARETH, as ſuch; and *two* more to each of them, as grandſons of HINDA;

while *one thirty-ſixth* part would have gone to each of ASIMA's female deſcendants. The reaſon of theſe different diſtributions will appear from what has preceded; but the arithmetical proceſſes would fill many pages, and would be thought, I am perſuaded, unneceſſarily prolix.

On the chapter concerning hermaphrodites *, I ſhall make no particular obſervation; ſince monſtrous births are, I truſt, extremely rare in all countries, and the ſubject is too ſhocking to be diſcuſſed without actual neceſſity; nor will it anſwer, I imagine, any uſeful purpoſe to relate the old *Arabian* ſtories, and ſtrange opinions of ſome lawyers, concerning the longeſt poſſible time of geſtation †; which is now limited, on the authority of AAISHA, one of MOHAMMED's wives, to *two years*; and, though the *Muſelmans* have traditionary accounts of *three*, *four*, or even *five* children produced at one birth, yet the practice, we find, is to reſerve the ſhare of *one* ſon; or that of one *daughter*, if, on ſuppoſition of her birth, the ſum reſerved would be larger ‡. The practice of *reſervation* for the unborn child is well explained by the caſe in the text, to which we may now proceed, ſince the reſt of the chapter needs no illuſtration; unleſs it be neceſſary to inform

* Page 256. † Page 258. ‡ Page 259, 260.

the reader, that a widow ought by law to abſtain for a certain time after her huſband's death, from the careſſes of any other man; and, if ſhe freely confeſs that ſhe has not abſtained, it cannot be certain, that her huſband was the father of a child born more than ſix months after his death. Let us then ſuppoſe AMRU to die, leaving a daughter ZAINEB, his mother ASUMA, his father LEBID, and his wife HINDA enſeint *. So that, if a male child be born, AMRU's eſtate ought regularly to be divided into *twenty-four* parts, but, on the birth of a female, into *twenty-ſeven*; becauſe, in the firſt caſe, the *ſhares* are an *eighth*, for the widow, and a *ſixth* for each of the parents; but, in the ſecond, beſides the ſhares juſt mentioned, the daughters would have *two-thirds* between them, and it would be the caſe of *Mimberiyya*†. Now *three* is the *common* meaſure of *twenty-four* and *twenty-ſeven*, and the ſeveral *meaſures* of thoſe numbers are *eight* and *nine*, either of which, multiplied into the other *whole* number, gives *two hundred and ſixteen* for the product; and that, according to what has preceded, is the number of ſhares into which the inheritance muſt be actually divided. In the firſt caſe HINDA would have *twenty-ſeven* ſhares; LEBID

* Page 260. † Page 227, 228.

and ASUMA, each *thirty-ſix*; the poſthumous ſon *ſeventy-eight*, and ZAINEB, his ſiſter, *thirty-nine*; but, in the ſecond, the widow would have *twenty-four*; and each of the parents, *thirty-two*; while the poſthumous daughter and her ſiſter would divide the remainder between them, each taking *ſixty-four* ſhares. Should *four* poſthumous ſons be born, *ninety-nine* ſhares would go to the widow and both parents; while the remainder would be divided among the children by the rule before mentioned, ZAINEB receiving *thirteen* parts, and each of her brothers *twenty-ſix*; but, in the caſe of a miſcarriage, the daughter would be entitled to *a hundred and eight* parts, or a moiety of the whole eſtate, and the *nine* parts remaining would go to LEBID as reſiduary heir.

The time, at which an abſent perſon is preſumed in law to be dead, has varied, we ſee, in different ages*; but the modern practice I underſtand to be this: if ZAID has been ſo long abſent, that no man can tell whether he be dead or alive, and if *ſeventy* years have elapſed from the day of his birth, he is preſumed to be dead, as to *his own* property, from the end of that term, but, as to his hereditary claims on the property *of another*, from the day of his abſence;

* Page 262.

ſo that, in the firſt caſe, no perſon, dying within the ſeventy years, could have inherited any part of *his* eſtate; nor, in the ſecond, could he inherit from any one, who died after the day, when he firſt was miſſed. Though the arrangement of an inheritance, on which an abſent perſon may have a claim, be ſufficiently clear from what has juſt preceded, yet a feigned caſe in illuſtration of it will not, perhaps, be thought wholly ſuperfluous. If HINDA then die at *Murſhedabád*, leaving AMRU her huſband, with two ſiſters of the whole blood, NA'DIRA and SACI'NA, all reſiding in that city, and a whole brother ZAID, who has long been abſent and unheard of, we muſt conſider what effect his life or his death would have on the inheritance: if he be dead, AMRU muſt have a *moiety* of the eſtate, and the ſiſters *two thirds* between them; and, if he be living, the widower will ſtill have a right to his half, but ZAID will take twice as much as either of the ſiſters. Now, on the firſt ſuppoſition, the aſſets of HINDA muſt be divided, as we have ſhown, into *ſeven* ſhares, of which AMRU muſt have *three*, and each of the ſiſters, *two*; but, on the ſecond, into *eight* parts, *four* of which go to the huſband, and *two* to the brother, while NA'DIRA and SACI'NA can only have *one* a piece; ſo that the widower has an intereſt in ſuppoſing ZAID alive, and the ſiſters, in ſuppoſing him dead: *fifty-ſix*, therefore, or the

product of *ſeven* and *eight*, which are *prime* to one another, is the number of ſhares, into which the eſtate muſt be divided; *twenty-four* of them being delivered to AMRU, and ſeven to each of the females, as the leaſt ſhares to which they can in either event be ſeverally entitled; if ZAID then return to the city, *four* ſhares more go to AMRU, and *fourteen* are the right of the brother; but, if his death be proved, or preſumed by lapſe of time, the *eighteen* reſerved ſhares muſt be divided equally between SACI'NA and NA'DIRA, to complete their *two ſevenths*, which the law gives, in that caſe, to each of them. The *Perſian* commentator has added three caſes, in one of which the two firſt diviſors of the aſſets are *compoſit* to each other; but the operation in all of them is too eaſy to require an example.

In the ſections concerning apoſtates and priſoners of war*, there ſeems to be no obſcurity; but it is proper to add, that, as the law is now ſettled, the heirs of an apoſtate, who were in being at the time of his death, are entitled to their legal ſhares, whether they were born before or after his apoſtaſy; though a huſband or wife cannot ſucceed to an apoſtate, becauſe a change of religion is an immediate diſſolution of the marriage.

* Page 264.

We are now come to the concluding ſection, which cannot be better illuſtrated than by two feigned caſes from the *Perſian* and *Arabian* comments. 1. ZAID and his daughter ABLA were at ſea in the ſame ſhip, together with BASHAR, his brother's ſon, and his great nephew AMRU, ſon of BASHAR: the ſhip was loſt, and all, who were in it, periſhed; ſo that which of them firſt died, could never be clearly aſcertained. Now AMRU left behind him a wife and a daughter; and ABLA had an only ſon: in this caſe, by the opinion of ABU HANIFAH and his followers, the four drowned perſons are ſuppoſed to have periſhed in the ſame inſtant, and their ſeveral eſtates go to their ſurviving heirs reſpectively, according to the rules, which have been already explained; but by one of two traditions from ALI, the aſſets of ZAID being equally divided, and ABLA being ſuppoſed to have outlived her father, the ſon takes one moiety in her right, while the other moiety is conceived at firſt to have veſted in BASHAR, and then in AMRU, between whoſe widow and daughter it is diſtributable according to law. 2. KA'SIM and his younger half-brother HASAN were drowned in the ſame boat, each leaving a mother, a daughter, and a patron, by whom each of them had been manumitted: then, if each of them left *ninety* pieces of gold on ſhore, the pro-

perty of each muſt be ſeverally diſtributed, according to the HANIFEANS; the daughter of each taking *half*, or *forty-five* pieces; the mother a *ſixth*, or *fifteen*, and the manumittor, as reſiduary, the *thirty* pieces which remain; but according to ALI, the younger brother HASAN being firſt conſidered as the ſurvivor, that reſidue veſts in him, and is then diſtributed, in the juſt mentioned ratio; *half* of it, or *fifteen*, going to his daughter; a *ſixth*, or *five* pieces, to his mother; and *ten*, the reſidue, to his patron; next, KA'SIM being ſuppoſed to have ſurvived, the ſame rule is applied to him; ſo that the daughter of each takes on the whole *ſixty*; the mother, *twenty*; and the manumittor, *ten* pieces of gold.

قَدْ طُبِعَ هٰذَا الْكِتَابُ الْمُسَمَّى بِالْفَرَائِضِ السِّرَاجِيَّهْ

بِدَارِ الْامَارَةِ بِلْدَةِ كَلْكَتَّةَ الْمَحْمِيَّهْ وَ ذٰلِكَ بِاَمْرِ

سَرْ وِلْيَم يُونْس الَّذِي هُوَ اَحَدُ حُكَّامِ الْمَحْكَمَةِ الْعَالِيَةِ

السُّلْطَانِيَّهْ

فِي سَنَةِ اَلْفٍ وَ مِايَتَيْنِ وَ وَاحِدٍ مِنَ الْهِجْرَةِ النَّبَوِيَّهْ

N.B. The *Arabic* sheets must be placed according to the signatures (from the right hand to the left) so as to begin where an *English* book would end, and to end where that would begin. To follow page 322, vol. vi.

تصحيح الكتاب

عدد الأوراق	الصحيح	السقيم
١٨	أوأحدهما	أوأحدهما
١٩	من ابني	من ابن
١٩	الآخر	الأخر
٢١	الهال كله	الهال كله
٢١	ونصف سهم إن كان	ونصف إن كان
٢٣	ذكورته	ذكورته
٢٣	الآخر	الأخر

قد صحح هذا الكتاب بعون الله تعالى الملك الوهاب

تَصْحِيحُ الكِتَابِ

عَدَدُ الأَوْرَاقِ . الصَّحِيحُ . . . . . السَّقِيمُ

١٦ . . . . الإِنَاثَ . . . . . الأَنَاثَ . . . . .

١٧ . . . . إِبْنَيْ بِنْتِ بِنْتِ بِنْتٍ . إِبْنَيْنِ بِنْتٌ بِنْتٌ بِنْتٌ

١٧ . . . . بِنْتِ ابْنِ بِنْتِ بِنْتٍ . بِنْتِ ابْنٌ بِنْتٌ بِنْتٌ

١٧ . . . . بِنْتَيْ بِنْتِ ابْنِ بِنْتٍ . بِنْتَيْنِ بِنْتٌ ابْنٌ بِنْتٌ

١٧ . . . . الأَخَرُ . . . . . الأَخَرُ . . . . .

١٧ . . . . الرِّوَايَتَيْنِ . . . . الرَّوَايَتَيْنِ . . .

١٧ . . . . بِنْتِ . . بِنْتٍ . بِنْتٌ . . بِنْتٌ
بِنْتَيْ . بِنْتَيْنِ .
إِبْنِ . . بِنْتٍ . ابْنٌ . . بِنْتٌ

١٧ . . . . إِبْنٌ - - - بِنْتِ - - بِنْتٍ ابْنٌ بِنْتٌ بِنْتٌ . .

تصحيح الكتاب

عدد الأوراق	الصحيح	السقيم
١٥	أولئك	أولهم
١٥	فإنها	فانها
١٤	أوكان	أوكان
١٤	صفة	صفة
١٤	أثلاثا	اثلاثا
١٤	للذكر	للذكر
١٤	رحمة الله	رحمة الله
١٤	أثلاثا	اثلاثا
١٤	والإناث	والاناث

تَصْحِيحُ الكِتَابِ

عدد الأوراق	الصَّحِيحُ	السَّقِيمُ
٩	أَعْتَقْنَ	اعْتَقْنَ
١٢	مَالِكُ	مَالِكَ
١٢	إِنْ وَافَقَ	أَنْ وَافَقَ
١٣	ثُمَّ اضْرِبْ	ثُمَّ أَضْرِبْ
١٣	أُخْتٍ	أَخْتٍ
١٥	أَبَوَيِ	أَبَوَيْ
١٥	الرَّابِعُ	الرَّابِعَ
١٥	أَنَّ اقْرَبَ	إِنَّ أَقْرَبَ
١٥	الْمَأْخُوذُ	الْمَأْخُوذَ

مَا تَوَامَعَا فَمَالُ كُلِّ وَاحِدٍ مِنْهُمْ لِوَرَثَتِهِ الْأَحْيَاءِ وَلَا يَرِثُ

بَعْضُ الْأَمْوَاتِ مِنْ بَعْضٍ هٰذَا هُوَ الْمُخْتَارُ وَقَالَ عَلِيٌّ

وَابْنُ مَسْعُودٍ فِي إِحْدَى الرِّوَايَتَيْنِ عَنْهُمَا بَعْضُهُمْ

يَرِثُ مِنْ بَعْضٍ إِلَّا فِيمَا وَرِثَ كُلُّ وَاحِدٍ مِنْهُمْ مِنْ صَاحِبِهِ

تَمَّتِ الْفَرَائِضُ السِّرَاجِيَّةُ بِعَوْنِ

اللّٰهِ تَعَالَى

فهو فيء بالإجماع وكسب المرتدة جميعا لورثتها المسلمين
بالخلاف بين اصحابنا رحمهم الله واما المرتد فلا يرث
من أحد لا من مسلم ولا من مرتد مثله وكذلك المرتدة
لا ترث من احد الا اذا ارتد اهل ناحية باجمعهم فحينئذ
يتوارثون

باب الأسير

حكم الأسير كحكم سائر المسلمين في الميراث سالم
يفارق دينه فان فارق دينه فحكمه حكم المرتد فان لم يعلم
ردته ولا حياته ولا موته فحكمه حكم المفقود

فصل في الغرقى والحرقى ونحوهم

اذا ماتت جماعة ولا يدرى ايهم مات اولا حكمنا لكل

من ماله لان المفقود ميت في مال غيره الاصل في تصحيح

مسايل المفقود ان تصحح المسئلة علي تقدير حياته ثم

تصحح المسئلة علي تقدير وفاته و باقي العمل

ماذكر نافي الحمل

فصل في المرتد

اذا مات المرتد اوقتل اولحق بدار الحرب وحكم القاضي

بلحوقه فما اكتسبه في حال اسلامه فهو لورثته المسلمين

وما اكتسبه في حال الردة يوضع في بيت المال عند

ابي حنيفة رحمه الله وعندهما الكسبان جميعا لورثته

المسلمين وعند الشافعي رحمه الله الكسبان يوضعان

في بيت المال وما اكتسبه بعد اللحوق بدار الحرب

تَصْحِيحُ الكِتَابِ

عدد الأوراق	الصَّحِيحُ	السَّقِيمُ
٩	أَعْتَقْنَ	اعْتَقْنَ
١٢	مَالِكُ	مَالِكَ
١٢	إِنْ وَافَقَ	أَنْ وَافَقَ
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١٥	أَبَوَيِ	أَبَوِيَّ
١٥	الرَّابِعُ	الرَّابِعَ
١٥	أَنَّ أَقْرَبَ	إِنَّ أَقْرَبَ
١٥	الْمَأْخُوذُ	الْمَأْخُوذَ

مَاَ تَوَامَعًا فَمَالُ كُلِّ وَاحِدٍ مِنْهُمْ لِوَرَثَتِهِ الْاَحْيَاءِ وَلَا يَرِثُ

بَعْضُ الْاَمْوَاتِ مِنْ بَعْضٍ هٰذَا هُوَ الْمُخْتَارُ وَقَالَ عَلِيٌّ

وَابْنُ مَسْعُوْدٍ فِيْ إِحْدَى الرِّوَايَتَيْنِ عَنْهُمَا بَعْضُهُمْ

يَرِثُ مِنْ بَعْضٍ اِلَّا فِيْمَا وَرِثَ كُلُّ وَاحِدٍ مِنْهُمْ مِنْ صَاحِبِهِ

تَمَّتِ الْفَرَائِضُ السِّرَاجِيَّةُ بِعَوْنِ

اللّٰهِ تَعَالَى

فهو فيي بالإجماع وكسب المرتدة جميعا لورثتها المسلمين

بالخلاف بين اصحابنا رحمهم الله واما المرتد فلا يرث

من أحد لا من مسلم ولا من مرتد مثله وكذلك المرتدة

لا ترث من احد الا اذا ارتد اهل ناحية باجمعهم فحينئذ

يتوارثون

باب الأسير

حكم الأسير كحكم سائر المسلمين في الميراث مالم

يفارق دينه فان فارق دينه فحكمه حكم المرتد فان لم يعلم

ردته ولا حياته ولا موته فحكمه حكم المفقود

فصل في الغرقي والحرقي والهدمي

اذا مات جماعة ولا يدري أيهم مات أولا جعلوا كأنهم

من ماله لان المفقود ميت في مال غيره الاصل في تصحيح

مسايل المفقود ان تصحح المسئلة علي تقدير حياته ثم

تصحح المسئلة علي تقدير وفاته و باقي العمل

ماذكرنا في الحمل

فصل في المرتد

اذا مات المرتد او قتل او لحق بدار الحرب وحكم القاضي

بلحوقه فما اكتسبه في حال اسلامه فهو لورثته المسلمين

وما اكتسبه في حال الردة يوضع في بيت المال عند

ابي حنيفة رحمه الله وعندهما الكسبان جميعا لورثته

المسلمين وعند الشافعي رحمه الله الكسبان يوضعان

في بيت المال وما اكتسبه بعد اللحوق بدار الحرب

فهو فيي بالإجماع وكسب المرتدة جميعا لورثتها المسلمين
بالخلاف بين اصحابنا رحمهم الله واما المرتد فلا يرث
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يتوارثون

باب الأسير

حكم الاسير كحكم ساير المسلمين في الميراث مالم
يفارق دينه فان فارق دينه فحكمه حكم المرتد فان لم يعلم
ردته ولا حياته ولا موته فحكمه حكم المفقود

فصل في الغرقي والحرقي والهدمي

اذا ماتت جماعة ولا يدري أيهم مات أولا جعلوا كأنهم

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مسايل المفقود ان تصحح المسئلة علي تقدير حياته ثم

تصحح المسئلة علي تقدير وفاته و باقي العمل

ماذكرنا في الحمل

فصل في المرتد

اذا مات المرتد او قتل او لحق بدار الحرب وحكم القاضي

بلحوقه فما اكتسبه في حال اسلامه فهو لورثته المسلمين

وما اكتسبه في حال الردة يوضع في بيت المال عند

ابي حنيفة رحمه الله وعندهما الكسبان جميعا لورثته

المسلمين وعند الشافعي رحمه الله الكسبان يوضعان

في بيت المال وما اكتسبه بعد اللحوق بدار الحرب

فهو فيي بالإجماع وكسب المرتدة جميعا لورثتها المسلمين

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لا ترث من احد الا اذا ارتد اهل ناحية باجمعهم فحينئذ

يتوارثون

باب الأسير

حكم الاسير كحكم سائر المسلمين في الميراث مالم

يفارق دينه فان فارق دينه فحكمه حكم المرتد فان لم يعلم

ردته ولا حياته ولا موته فحكمه حكم المفقود

فصل في الغرقي والحرقي والهدمي

اذا ماتت جماعة ولا يدري أيهم مات أولا جعلوا كأنهم

من ماله لان المفقود ميت في مال غيره الاصل في تصحيح

مسايل المفقود ان تصحح المسئلة علي تقدير حياته ثم

تصحح المسئلة علي تقدير وفاته و باقي العمل

ماذكر نافي الحمل

فصل في المرتد

اذا مات المرتد اوقتل اولحق بدار الحرب وحكم القاضي

بلحوقه فما اكتسبه في حال اسلامه فهو لورثته المسلمين

وما اكتسبه في حال الردة يوضع في بيت المال عند

ابي حنيفة رحمه الله وعندهما الكسبان جميعا لورثته

المسلمين وعند الشافعي رحمه الله الكسبان يوضعان

في بيت المال وما اكتسبه بعد اللحوق بدار الحرب

يصح موته او يمضي عليه المدة واختلفت الروايات في تلك
المدة ففي ظاهر الرواية أنه اذا لم يبق أحد من أقرانه
حكم بموته وروي الحسن بن زياد عن ابي حنيفة رحمه الله
أن تلك المدة مائة وعشرون سنة من يوم ولد فيه وقال
محمد مائة وعشر سنين وقال ابو يوسف مائة وخمس سنين
وقال بعضهم تسعون سنة وعليه الفتوى وقال بعضهم
مال المفقود موقوف الى اجتهاد الامام وموقوف الحكم
في حق غيره حتى يوقف نصيبه من مال مورثه كما في
الحمل فاذا مضت المدة وحكم بموته فماله لورثته
الموجودين عند الحكم بموته وما كان موقوفا لاجله من
مال مورثه يرد الى وارث مورثه الذي وقف ذلك الموقوف

سَهْمًا لِأَنَّ الْمَوْقُوفَ فِي حَقِّهَا نَصِيبُ أَرْبَعَةِ بَنِينَ عِنْدَ

أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ وَإِذَا كَانَ الْبَنُونَ اربعة فنصيبها سهم

وَأَرْبَعَةُ أَتْسَاعِ سَهْمٍ مِنْ أَرْبَعَةٍ وَعِشْرِينَ مَضْرُوبٌ فِي تِسْعَةٍ فَصَارَ

ثَلَاثَةَ عَشَرَ سَهْمًا فَهِيَ لَهَا وَالْبَاقِي مَوْقُوفٌ وَهُوَ مِائَةٌ وَخَمْسَةَ

عَشَرَ سَهْمًا فَإِنْ وَلَدَتْ بِنْتًا وَاحِدَةً أَوْ أَكْثَرَ فَجَمِيعُ الْمَوْقُوفِ

لِلْبَنَاتِ وَإِنْ وَلَدَتْ ابْنًا وَاحِدًا أَوْ أَكْثَرَ فَيُعْطَى لِلْمَرْأَةِ وَالْأَبَوَيْنِ

مَا كَانَ مَوْقُوفًا مِنْ نَصِيبِهِمْ وَمَا بَقِيَ يُقْسَمُ بَيْنَ الْأَوْلَادِ

وَإِنْ وَلَدَتْ مَيِّتًا فَيُعْطَى لِلْمَرْأَةِ وَالْأَبَوَيْنِ مَا كَانَ مَوْقُوفًا مِنْ

نَصِيبِهِمْ وَلِلْبِنْتِ إِلَى تَمَامِ النِّصْفِ فَهُوَ خَمْسَةٌ وَتِسْعُونَ سَهْمًا

وَالْبَاقِي لِلْأَبِ وَهُوَ تِسْعَةُ أَسْهُمٍ لِأَنَّهُ عَصَبَةٌ

بَابُ الْمَفْقُودِ

الْمَفْقُودُ حَيٌّ فِي مَالِ حَيَاتِي لَا يَرِثُ مِنْهُ أَحَدٌ وَيُوقَفُ مَالُ حَيَاتِي

واحد من الورثة ماكان موقوفا من نصيبه كما اذا ترك بنتا
وأبوين وامرأة حاملة فالمسئلة من أربعة وعشرين على
تقدير ان الحمل ذكر ومن سبعة وعشرين على تقدير انه
انثى وبين عددي تصحيح المسئلتين توافق بالثلث
فاذا ضرب وفق احدهما في جميع الاخر صار الحاصل مائتين
وستة عشر سهما ومنها تصح المسئلة وعلى تقدير ذكورته
للمرأة سبعة وعشرون ولكل واحد من الأبوين ستة
وثلاثون وعلى تقدير الانوثة للمرأة اربعة وعشرون ولكل
واحد من الابوين اثنان وثلاثون فيعطي للمرأة اربعة
وعشرون ويوقف من نصيبها ثلاثة اسهم ويوقف من نصيب
كل واحد من الابوين اربعة اسهم ويعطي للبنت ثلاثة عشر

الحمل ذكر وعلي تقدير انه انثي ثم تنظر بين تصحيح
المسئلتين فإن توافقا فاضرب وفق إحديهما في جميع
الأخري وإن تباينا فاضرب كل إحديهما في جميع الأخري
فالحاصل تصحيح المسئلة ثم اضرب نصيب من كان له شيء
من مسئلة ذكورته في مسئلة انوثته أو في وفقها ثم من كان
له شيء من مسئلة أنوثته في مسئلة ذكورته أو في وفقها
كما ذكرنا في الخنثي ثم انظر في الحاصلين من الضرب
أيهما أقل يعطي لذلك الوارث والفضل بينهما موقوف من
نصيب ذلك الوارث فإذا ظهر الحمل فإن كان مستحقا
لجميع الموقوف فبها وإن كان مستحقا للبعض فياخذ
ذلك البعض والباقي مقسوم بين الورثة فيعطي لكل

ولم تكن المراة اقرت بانقضاء العدة يرث ويورث عنه وإن
جاءت بالولد لأكثر من أكثر مدة الحمل لا يرث ولا يورث
عنه وإن كان الحمل من غيره وجاءت بالولد لستة اشهر أو
أقل يرث وإن جاءت بالولد لأكثر من اقل مدة الحمل
لا يرث وطريق معرفة حيوة الحمل وقت الولادة أن يوجد
منه ما يعلم به الحيوة كصوت او عطاس او بكاء او ضحك او
تحريك عضو فإن خرج اقل الولد ثم مات لا يرث وإن خرج
اكثره ثم مات يرث فإن خرج الولد مستقيما فالمعتبر
صدره اعني إذا خرج صدره كله يرث وإن خرج منكوسا
فالمعتبر سرته الاصل في تصحيح مسايل الحمل ان
تصحح المسئلة على تقديرين اعني على تقدير ان

سنين وعند الشافعي رحمه الله أربع سنين وعند الزهري

رحمه الله سبع سنين و اقلها ستة اشهر و يوقف للحمل

عند أبي حنيفة رحمه الله نصيب أربعة بنين أو نصيب أربع

بنات ايهما أكثر ويعطي لبقية الورثة اقل الانصباء وعند

محمد رحمه الله يوقف نصيب ثلاثة بنين او ثلاث بنات

أيهما أكثر رواه عنه ليث ابن سعد رضي الله عنه وفي رواية

أخري نصيب ابنين واحدي الروايتين عن أبي يوسف

رحمه الله رواه عنه هشام و روي الخصاف عن ابي يوسف

رحمه الله أنه يوقف نصيب ابن واحد أو بنت واحدة وعليه

الفتوي ويوخذ الكفيل علي قوله وان كان الحمل من

الميت ورجات بالولد لتمام اكثر مدة الحمل او اقل منها

محمد رحمه الله يأخذ الخنثى خمسي المال إن كان ذكرا
وربع المال إن كان أنثى فيأخذ نصف النصيبين وذلك
خمس وثمن باعتبار الحالين وتصح من اربعين وهو
المجتمع من ضرب أحد المسئلتين وهي الاربعة
في الأخرى وهي الخمسة ثم المبلغ في الحالتين فمن
كان له شيء من الخمسة فمضروب في الاربعة ومن كان له
شيء من الاربعة فمضروب في الخمسة فصار للخنثى
ثلاثة عشر وللابن ثمانية عشر وللبنت تسعة أسهم

باب في الحمل

أكثر مدة الحمل سنتان عند ابي حنيفة رحمه الله
وأصحابه وعند ليث بن سعد الفهمي رحمه الله ثلاث

رضي الله عنهم وعليه الفتوى كما إذا ترك ابنا وبنتا وخنثى

فللخنثى نصيب بنت لأنه متيقن وعند عامر الشعبي

وهو قول ابن عباس رضي الله عنهما للخنثى نصف

النصيبين بالهنا زعموا واختلفا في تخريج قول الشعبي قال

ابو يوسف للابن سهم وللبنت نصف سهم وللخنثى ثلاثة

ارباع سهم لأن الخنثى يستحق سهما إن كان ذكرا و

نصف ان كان انثى وهذا متيقن في اخذ نصف مجموع

النصيبين أو نقول يأخذ النصف المتيقن مع نصف

النصف المتنازع فيه فصار له ثلاثة ارباع سهم لأنه يعتبر

السهم والعول وتصح من تسعة او نقول للابن سهمان وللبنت

سهم وللخنثى نصف النصيبين وهو سهم ونصف سهم وقال

لِأَبٍ لٰكِنِ الثُّلُثَيْنِ لِمَنْ يَدْلِي بِقَرَابَةِ الْأَبِ فَيُعْتَبَرُ فِيهِمْ قُوَّةُ
الْقَرَابَةِ ثُمَّ وَلَدُ الْعَصَبَةِ وَالثُّلُثُ لِمَنْ يَدْلِي بِقَرَابَةِ الْأُمِّ وَيُعْتَبَرُ
فِيهِمْ قُوَّةُ الْقَرَابَةِ ثُمَّ عِنْدَ اَبِي يُوسُفَ رَحِمَهُ اللّٰهُ مَااَصَابَ
كُلَّ فَرِيقٍ يُقْسَمُ عَلَي أَبْدَانِ فُرُوعِهِمْ مَعَ اعْتِبَارِ عَدَدِ
الْجِهَاتِ فِي الْفُرُوعِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللّٰهُ يُقْسَمُ الْمَالُ
عَلَي اَوَّلِ بَطْنٍ اخْتَلَفَ مَعَ اعْتِبَارِ عَدَدِ الْفُرُوعِ وَالْجِهَاتِ
فِي الْاُصُولِ كَمَا فِي الصِّنْفِ الْاَوَّلِ ثُمَّ يَنْتَقِلُ هٰذَا الْحُكْمُ إِلَي
جِهَةِ عُمُومَةِ أَبَوَيْهِ وَخُؤُولَتِهِمَا ثُمَّ إِلَي أَوْلَادِهِمْ ثُمَّ إِلَي جِهَةِ عُمُومَةِ
أَبَوَيْ أَبَوَيْهِ وَخُؤُولَتِهِمَا ثُمَّ إِلَي أَوْلَادِهِمْ كَمَا فِي الْعَصَبَاتِ

بَابُ الْخُنْثَي

لِلْخُنْثَي الْمُشْكِلِ اَقَلُّ النَّصِيبَيْنِ اَعْنِي اَسْوَءَ الْحَالَتَيْنِ
عِنْدَ اَبِي حَنِيفَةَ رَحِمَهُ اللّٰهُ وَاَصْحَابِهِ وَهُوَ قَوْلُ عَامَّةِ الصَّحَابَةِ

الْعَمِّ وَابْنِ الْعَمَّةِ كِلَاهُمَا لِأَبٍ وَأُمٍّ أَوْلِأَبٍ الْمَالُ كُلُّهُ لِبِنْتِ

الْعَمِّ وَإِنْ كَانَ أَحَدُهُمَا لِأَبٍ وَأُمٍّ وَالْآخَرُ لِأَبٍ كَانَ الْمَالُ كُلُّهُ

لِمَنْ كَانَتْ لَهُ قُوَّةُ الْقَرَابَةِ فِيْ ظَاهِرِ الرِّوَايَةِ قِيَاسًا عَلَى

خَالَةٍ لِأَبٍ مَعَ كَوْنِهَا وَلَدَ ذِي الرَّحِمِ تَكُوْنُ هِيَ أَوْلَى

لِقُوَّةِ الْقَرَابَةِ مِنَ الْخَالَةِ لِأُمٍّ مَعَ كَوْنِهَا وَلَدَ الْوَارِثِ لِأَنَّ التَّرْجِيْحَ

بِمَعْنًى فِيْهِ وَهُوَ قُوَّةُ الْقَرَابَةِ أَوْلَى مِنَ التَّرْجِيْحِ فِيْ غَيْرِهِ وَهُوَ

الْإِدْلَاءُ بِالْوَارِثِ وَقَالَ بَعْضُهُمُ الْمَالُ كُلُّهُ لِبِنْتِ الْعَمِّ لِأَبٍ لِأَنَّهَا

وَلَدُ الْعَصَبَةِ وَإِنِ اسْتَوَوَا فِي الْقُرْبِ وَلَكِنِ اخْتَلَفَ حَيِّزُ قَرَابَتِهِمْ

لَا اعْتِبَارَ هُنَا لِقُوَّةِ الْقَرَابَةِ وَلَا لِوَلَدِ الْعَصَبَةِ فِيْ ظَاهِرِ الرِّوَايَةِ

قِيَاسًا عَلَى عَمَّةٍ لِأَبٍ وَأُمٍّ مَعَ كَوْنِهَا ذَاتَ الْقَرَابَتَيْنِ وَوَلَدَ الْوَارِثِ

مِنَ الْجِهَتَيْنِ وَأُمِّهَا ذَاتُ فَرْضٍ لَيْسَتْ هِيَ بِأَوْلَى مِنَ الْخَالَةِ

لِأَبٍ لٰكِنِ الثُّلُثَيْنِ لِمَنْ يَدْلِي بِقَرَابَةِ الْأَبِ فَيُعْتَبَرُ فِيهِمْ قُوَّةُ
الْقَرَابَةِ ثُمَّ وَلَدُ الْعَصَبَةِ وَالثُّلُثُ لِمَنْ يَدْلِي بِقَرَابَةِ الْأُمِّ وَيُعْتَبَرُ
فِيهِمْ قُوَّةُ الْقَرَابَةِ ثُمَّ عِنْدَ اَبِي يُوسُفَ رَحِمَهُ اللّٰهُ مَااَصَابَ
كُلَّ فَرِيقٍ يُقْسَمُ عَلَي أَبْدَانِ فُرُوعِهِمْ مَعَ اعْتِبَارِ عَدَدِ
الْجِهَاتِ فِي الْفُرُوعِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللّٰهُ يُقْسَمُ الْمَالُ
عَلَي اَوَّلِ بَطْنٍ اخْتَلَفَ مَعَ اعْتِبَارِ عَدَدِ الْفُرُوعِ وَالْجِهَاتِ
فِي الْاُصُولِ كَمَا فِي الصِّنْفِ الْاَوَّلِ ثُمَّ يَنْتَقِلُ هٰذَا الْحُكْمُ إِلَي
جِهَةِ عُمُومَةِ أَبَوَيْهِ وَخُؤُولَتِهِمَا ثُمَّ إِلَي أَوْلَادِهِمْ ثُمَّ إِلَي جِهَةِ عُمُومَةِ
أَبَوَيْ أَبَوَيْهِ وَخُؤُولَتِهِمَا ثُمَّ إِلَي أَوْلَادِهِمْ كَمَا فِي الْعَصَبَاتِ

بَابُ الْخُنْثَي

لِلْخُنْثَي الْمُشْكِلِ اَقَلُّ النَّصِيبَيْنِ اَعْنِي اَسْوَءَ الْحَالَتَيْنِ
عِنْدَ اَبِي حَنِيفَةَ رَحِمَهُ اللّٰهُ وَاَصْحَابِهِ وَهُوَ قَوْلُ عَامَّةِ الصَّحَابَةِ

الْعَمِّ وَابْنِ الْعَمَّةِ كِلَاهُمَا لِأَبٍ وَأُمٍّ أَوْلِأَبٍ الْمَالُ كُلُّهُ لِبِنْتِ

الْعَمِّ وَإِنْ كَانَ أَحَدُهُمَا لِأَبٍ وَأُمٍّ وَالْآخَرُ لِأَبٍ كَانَ الْمَالُ كُلُّهُ

لِمَنْ كَانَتْ لَهُ قُوَّةُ الْقَرَابَةِ فِيْ ظَاهِرِ الرِّوَايَةِ قِيَاسًا عَلَى

خَالَةٍ لِأَبٍ مَعَ كَوْنِهَا وَلَدَ ذِي الرَّحِمِ تَكُوْنُ هِيَ أَوْلَى

لِقُوَّةِ الْقَرَابَةِ مِنَ الْخَالَةِ لِأُمٍّ مَعَ كَوْنِهَا وَلَدَ الْوَارِثِ لِأَنَّ التَّرْجِيْحَ

بِمَعْنًى فِيْهِ وَهُوَ قُوَّةُ الْقَرَابَةِ أَوْلَى مِنَ التَّرْجِيْحِ فِيْ غَيْرِهِ وَهُوَ

الْأَدَاءُ بِالْوَارِثِ وَقَالَ بَعْضُهُمُ الْمَالُ كُلُّهُ لِبِنْتِ الْعَمِّ لِأَبٍ لِأَنَّهَا

وَلَدُ الْعَصَبَةِ وَإِنِ اسْتَوَوَا فِي الْقُرْبِ وَلَكِنِ اخْتَلَفَ حَيِّزُ قَرَابَتِهِمْ

لِاعْتِبَارِ هُنَا لِقُوَّةِ الْقَرَابَةِ وَلَا لِوَلَدِ الْعَصَبَةِ فِيْ ظَاهِرِ الرِّوَايَةِ

قِيَاسًا عَلَى عَمَّةٍ لِأَبٍ وَأُمٍّ مَعَ كَوْنِهَا ذَاتَ الْقَرَابَتَيْنِ وَوَلَدُ الْوَارِثِ

مِنَ الْجِهَتَيْنِ وَأُمُّهَا ذَاتُ فَرْضٍ لَيْسَتْ هِيَ بِأَوْلَى مِنَ الْخَالَةِ

لِأَبٍ وَأُمٍّ أَوْلَادِ أَوْلَادِ أُمٍّ فَإِنْ كَانَ حَيِّزُ قَرَابَتِهِمْ مُخْتَلِفًا فَلَا اعْتِبَارَ لِقُوَّةِ الْقَرَابَةِ كَعَمَّةٍ لِأَبٍ وَأُمٍّ وَخَالَةٍ لِأُمٍّ أَوْ خَالَةٍ لِأَبٍ وَأُمٍّ وَعَمَّةٍ لِأُمٍّ فَالثُّلُثَانِ لِقَرَابَةِ الْأَبِ وَهُوَ نَصِيبُ الْأَبِ وَالثُّلُثُ لِقَرَابَةِ الْأُمِّ وَهُوَ نَصِيبُ الْأُمِّ ثُمَّ مَا أَصَابَ كُلَّ فَرِيقٍ يُقْسَمُ بَيْنَهُمْ كَمَا لَوْ اتَّحَدَ حَيِّزُ قَرَابَتِهِمْ

فَصْلٌ فِي أَوْلَادِهِمْ وَأَحْكَامِهِمْ

اَلْحُكْمُ فِيهِمْ كَالْحُكْمِ فِي الصِّنْفِ الْأَوَّلِ أَعْنِي أَوْلَادَهُمْ بِالْمِيرَاثِ أَقْرَبُهُمْ إِلَى الْمَيِّتِ مِنْ أَيِّ جِهَةٍ كَانَ وَإِنِ اسْتَوَوْا فِي الْقُرْبِ وَكَانَ حَيِّزُ قَرَابَتِهِمْ مُتَّحِدًا فَمَنْ كَانَ لَهُ قُوَّةُ الْقَرَابَةِ فَهُوَ أَوْلَى بِالْإِجْمَاعِ وَإِنِ اسْتَوَوْا فِي الْقُرْبِ وَالْقَرَابَةِ وَكَانَ حَيِّزُ قَرَابَتِهِمْ مُتَّحِدًا فَوَلَدُ الْعَصَبَةِ أَوْلَى مِمَّنْ لَا يَكُونُ كَبِنْتٍ

بنت ابن اخ لاب وام بنت ابن اخ لاب بنت ابن اخ لام

المال كله لبنت ابن الاخ لأب وأم بالاتفاق لأنها ولد العصبة

ولها أيضا قوة القرابة

فصل في الصنف الرابع

الحكم فيهم انه اذا انفرد واحد منهم استحق المال كله

لعدم المزاحم واذا اجتمعوا وكان حيز قرابتهم متحدا

كالعمات والاعمام لام او الاخوال والخالات فالاقوي منهم

أولي بالاجماع أعني من كان لأب وأم أولي ممن كان

لأب ومن كان لأب أولي ممن كان لام ذكورا كانوا او اناثا

وان كانوا ذكورا واناثا واستوت قرابتهم فللذكر مثل

حظ الانثيين كعم وعمة كلاهما لام او خال وخالة كلاهما

لِأَبٍ لٰكِنِ الثُّلُثَيْنِ لِمَنْ يَدْلِي بِقَرَابَةِ الْأَبِ فَيُعْتَبَرُ فِيهِمْ قُوَّةُ
الْقَرَابَةِ ثُمَّ وَلَدُ الْعَصَبَةِ وَالثُّلُثُ لِمَنْ يَدْلِي بِقَرَابَةِ الْأُمِّ وَيُعْتَبَرُ
فِيهِمْ قُوَّةُ الْقَرَابَةِ ثُمَّ عِنْدَ اَبِي يُوسُفَ رَحِمَهُ اللّٰهُ مَااَصَابَ
كُلَّ فَرِيقٍ يُقْسَمُ عَلَي أَبْدَانِ فُرُوعِهِمْ مَعَ اعْتِبَارِ عَدَدِ
الْجِهَاتِ فِي الْفُرُوعِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللّٰهُ يُقْسَمُ الْمَالُ
عَلَي اُولِ بَطْنٍ اخْتَلَفَ مَعَ اعْتِبَارِ عَدَدِ الْفُرُوعِ وَالْجِهَاتِ
فِي الْاُصُولِ كَمَا فِي الصِّنْفِ الْاَوَّلِ ثُمَّ يَنْتَقِلُ هٰذَا الْحُكْمُ إِلَي
جِهَةِ عُمُومَةِ أَبَوَيْهِ وَخُؤُولَتِهِمَا ثُمَّ إِلَي أَوْلَادِهِمْ ثُمَّ إِلَي جِهَةِ عُمُومَةِ
أَبَوَيْ أَبَوَيْهِ وَخُؤُولَتِهِمَا ثُمَّ إِلَي أَوْلَادِهِمْ كَمَا فِي الْعَصَبَاتِ

بَابُ الْخُنْثَي

لِلْخُنْثَي الْمُشْكِلِ اَقَلُّ النَّصِيبَيْنِ اَعْنِي اَسْوَءَ الْحَالَتَيْنِ
عِنْدَ اَبِي حَنِيفَةَ رَحِمَهُ اللّٰهُ وَاَصْحَابِهِ وَهُوَ قَوْلُ عَامَّةِ الصَّحَابَةِ

الْعَمِّ وَابْنِ الْعَمَّةِ كِلَاهُمَا لِأَبٍ وَأُمٍّ أَوْلَابٍ الْمَالَ كُلَّهُ لِبِنْتِ

الْعَمِّ وَإِنْ كَانَ أَحَدُهُمَا لِأَبٍ وَأُمٍّ وَالْآخَرُ لِأَبٍ كَانَ الْمَالُ كُلُّهُ

لِمَنْ كَانَتْ لَهُ قُوَّةُ الْقَرَابَةِ فِيْ ظَاهِرِ الرِّوَايَةِ قِيَاسًا عَلَى

خَالَةٍ لِأَبٍ مَعَ كَوْنِهَا وَلَدَ ذِي الرَّحِمِ تَكُوْنُ هِيَ أَوْلَى

لِقُوَّةِ الْقَرَابَةِ مِنَ الْخَالَةِ لِأُمٍّ مَعَ كَوْنِهَا وَلَدَ الْوَارِثِ لِأَنَّ التَّرْجِيْحَ

بِمَعْنًى فِيْهِ وَهُوَ قُوَّةُ الْقَرَابَةِ أَوْلَى مِنَ التَّرْجِيْحِ فِيْ غَيْرِهِ وَهُوَ

الْإِدْلَاءُ بِالْوَارِثِ وَقَالَ بَعْضُهُمُ الْمَالُ كُلُّهُ لِبِنْتِ الْعَمِّ لِأَبٍ لِأَنَّهَا

وَلَدُ الْعَصَبَةِ وَإِنِ اسْتَوَوْا فِي الْقُرْبِ وَلَكِنِ اخْتَلَفَ حَيِّزُ قَرَابَتِهِمْ

لَا اعْتِبَارَ هُنَا لِقُوَّةِ الْقَرَابَةِ وَلَا لِوَلَدِ الْعَصَبَةِ فِيْ ظَاهِرِ الرِّوَايَةِ

قِيَاسًا عَلَى عَمَّةٍ لِأَبٍ وَأُمٍّ مَعَ كَوْنِهَا ذَاتَ الْقَرَابَتَيْنِ وَوَلَدَ الْوَارِثِ

مِنَ الْجِهَتَيْنِ وَأُمَّهَاتُ فَرْضٍ لَيْسَتْ هِيَ بِأَوْلَى مِنَ الْخَالَةِ

لأب وأم اولاب اولام فإن كان حيز قرابتهم مختلفا فلا
اعتبار لقوة القرابة كعمة لأب وأم وخالة لأم أو خالة لأب وأم
وعمة لأم فالثلثان لقرابة الأب وهو نصيب الأب والثلث
لقرابة الأم وهو نصيب الأم ثم ما اصاب كل فريق يقسم بينهم
كما لو اتحد حيز قرابتهم

فصل في أولادهم وأحكامهم

الحكم فيهم كالحكم في الصنف الأول اعني اولاهم
بالميراث أقربهم الى الميت من أي جهة كان وإن استووا
في القرب وكان حيز قرابتهم متحدا فمن كان له قوة
القرابة فهو أولى بالاجماع وإن استووا في القرب والقرابة وكان
حيز قرابتهم متحدا فولد العصبة اولى ممن لا يكون كبنت

بنت ابن اخ لاب وام بنت ابن اخ لاب بنت ابن اخ لام

المال كله لبنت ابن الاخ لاب وام بالاتفاق لانها ولد العصبة

ولها أيضا قوة القرابة

فصل في الصنف الرابع

الحكم فيهم انه اذا انفرد واحد منهم استحق المال كله

لعدم المزاحم واذا اجتمعوا وكان حيز قرابتهم متحدا

كالعمات والاعمام لام او الاخوال والخالات فالاقوي منهم

أولي بالاجماع أعني من كان لاب وام أولي ممن كان

لاب ومن كان لاب أولي ممن كان لام ذكورا كانوا او اناثا

وان كانوا ذكورا واناثا واستوت قرابتهم فللذكر مثل

حظ الانثيين كعم وعمة كالاهما لام او خال وخالة كالاهما

٣٠

مب

اخ لاب وام اخ لام اخت لاب وام اخت لاب اخت لام
بنت بنت بنت ابن بنت ابن بنت ابن بنت

عِنْدَ أَبِي يُوسُفَ يُقْسَمُ كُلُّ الْمَالِ بَيْنَ فُرُوعِ بَنِي الْأَعْيَانِ ثُمَّ
بَيْنَ فُرُوعِ بَنِي الْعَلَّاتِ ثُمَّ بَيْنَ فُرُوعِ بَنِي الْأَخْيَافِ لِلذَّكَرِ
مِثْلُ حَظِّ الْأُنْثَيَيْنِ أَرْبَاعًا بِاعْتِبَارِ الْأَبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ
اللَّهُ يُقْسَمُ ثُلُثُ الْمَالِ بَيْنَ فُرُوعِ بَنِي الْأَخْيَافِ عَلَى التَّسْوِيَةِ
أَثْلَاثًا بِاعْتِبَارِ اسْتِوَاءِ أُصُولِهِمْ فِي قِسْمَةِ الْآبَاءِ وَالْبَاقِي بَيْنَ
فُرُوعِ بَنِي الْأَعْيَانِ أَنْصَافًا بِاعْتِبَارِ عَدَدِ الْفُرُوعِ فِي الْأُصُولِ
نِصْفُهُ لِبِنْتِ الْأَخِ نَصِيبُ أَبِيهَا وَالنِّصْفُ الْآخَرُ بَيْنَ وَلَدَيِ
الْأُخْتِ لِلذَّكَرِ مِثْلُ حَظِّ الْأُنْثَيَيْنِ بِاعْتِبَارِ الْأَبْدَانِ وَتَصِحُّ
مِنْ تِسْعَةٍ وَلَوْ تَرَكَ ثَلَاثَ بَنَاتِ بَنِي أُخْوَةٍ مُتَغَرِّقِينَ
بِهَذِهِ الصُّورَةِ

باعتبار الأصول وإن استووا في القرب وليس فيهم ولد عصبة

أو كان كلهم أولاد العصبات أو كان بعضهم أولاد العصبات

وبعضهم أولاد أصحاب الفرائض واختلفت قرابتهم

فأبو يوسف رحمه الله يعتبر الأقوى ومحمد رحمه الله يقسم

المال على الإخوة والأخوات نصفين مع اعتبار عدد الفروع

والجهات في الأصول فما أصاب كل فريق يقسم بين فروعهم

كما في الصنف الأول كبنت بنت الأخت لأب وأم أولى من

ابن بنت الأخ لأب عند أبي يوسف رحمه الله لقوة القرابة

وعند محمد رحمه الله يقسم المال بينهما نصفين باعتبار

الأصول كما إذا ترك ثلاث بنات إخوة متفرقين وثلاث

بنين وثلاث بنات أخوات متفرقات بهذه الصورة

الأول وإن اختلفت قرابتهم فالثلثان لقرابة الأب وهو نصيب
الأب والثلث لقرابة الأم وهو نصيب الأم ثم ما أصاب كل
فريق يقسم بينهم كما لو اتحدت قرابتهم

فصل في الصنف الثالث

الحكم فيهم كالحكم في الصنف الأول أعني أولاهم
بالميراث أقربهم إلى الميت وإن استووا في القرب فولد
العصبة أولى من ولد ذوي الأرحام كبنت ابن أخ وابن
بنت أخت كلاهما لأب وأم أو لأب أو أحدهما لأب وأم والآخر
لأب المال كله لبنت ابن الأخ لأنها ولد العصبة ولو كان
لأم بينهما للذكر مثل حظ الأنثيين عند أبي يوسف رحمه
الله أثلاثا باعتبار الأبدان وعند محمد رحمه الله انصافا

فَصْلٌ فِي الصِّنْفِ الثَّانِي

أَوْلَاهُمْ بِالْمِيرَاثِ أَقْرَبُهُمْ إِلَى الْمَيِّتِ مِنْ أَيِّ جِهَةٍ كَانَ

وَعِنْدَ الِاسْتِوَاءِ فِي دَرَجَاتِ الْقُرْبِ فَمَنْ كَانَ يَدْلِي إِلَى

الْمَيِّتِ بِوَارِثٍ فَهُوَ أَوْلَى عِنْدَ أَبِي سُهَيْلٍ الْغَرَّابِضِي وَ

أَبِي فُضَيْلٍ الْخَصَّافِ وَعَلِيِّ ابْنِ عِيسَى الْبَصْرِيِّ وَلَا تَفْضِيلَ

لَهُ عِنْدَ أَبِي سُلَيْمَانَ الْجُرْجَانِيِّ وَأَبِي عَلِيٍّ الْبَيْهَقِيِّ الْبُسْتِيِّ

وَإِنِ اسْتَوَتْ مَنَازِلُهُمْ وَلَيْسَ فِيهِمْ مَنْ يَدْلِي بِوَارِثٍ أَوْ كَانَ

كُلُّهُمْ يَدْلُونَ بِوَارِثٍ فَإِنِ اتَّفَقَتْ صِفَةُ مَنْ يَدْلُونَ وَاتَّحَدَتْ

قَرَابَتُهُمْ فَالْقِسْمَةُ عَلَى أَبْدَانِهِمْ وَإِنِ اخْتَلَفَتْ صِفَةُ مَنْ يَدْلُونَ

بِهِمْ يُقْسَمُ الْمَالُ عَلَى أُصُولِ بُطُونٍ اخْتَلَفَ كَمَا فِي الصِّنْفِ

محمد رحمه الله يعتبر الجهات في الاصول كما اذا ترك بنتي بنت بنت وهما أيضا بنتا ابن بنت وابن بنت بنت بهذه الصورة

بنت	بنت	بنت
بنت	ابن	بنت
بنتين		ابن

عند أبي يوسف المال بينهم اثلاثا وصار البيت كأنه ترك اربع بنات وابنا فيكون ثلثاه للبنتين وثلثه للابن وعند محمد رحمه الله المال بينهم على ثمانية وعشرين سهما للبنتين اثنان وعشرون سهما ستة عشر من قبل أبيهما وستة اسهم من قبل أمهما وللابن ستة اسهم من قبل امه

ابْنِ الْبِنْتِ إِذْهِيَ نَصِيْبُ جَدِّهِمَا وَ ثَلَاثَةُ أَسْبَاعِهِ وَهُوَ

نَصِيْبُ الْبِنْتَيْنِ يُقْسَمُ عَلَي وَلَدَيْهِمَا أَعْنِي فِي الْبَطْنِ

الثَّالِثِ أَضَافَا نِصْفُهُ لِبِنْتِ ابْنِ بِنْتِ الْبِنْتِ نَصِيْبُ

أَبِيْهَا وَ النِّصْفُ الْأَخَرُ لِابْنَيْ بِنْتِ بِنْتِ الْبِنْتِ نَصِيْبُ أُمِّهِمَا

وَ تَصِحُّ مِنْ ثَمَانِيَةٍ وَعِشْرِيْنَ وَ قَوْلُ مُحَمَّدٍ رَحِمَهُ اللّٰهُ أَشْهَرُ

الرِّوَايَتَيْنِ عَنْ أَبِيْحَنِيْفَةَ رَحِمَهُ اللّٰهُ فِيْ جَمِيْعِ أَحْكَامِ

ذَوِي الْأَرْحَامِ وَهُوَ قَوْلُ أَبِيْ يُوْسُفَ الْأَوَّلُ ثُمَّ رَجَعَ فَقَالَ

لَاعِبْرَةَ لِلْأُصُوْلِ أَلْبَتَّةَ

فَصْلٌ

عُلَمَاؤُنَا رَحِمَهُمُ اللّٰهُ يَعْتَبِرُوْنَ الْجِهَاتِ فِي التَّوْرِيْثِ غَيْرَ أَنَّ

أَبَا يُوْسُفَ رَحِمَهُ اللّٰهُ يَعْتَبِرُ الْجِهَاتِ فِي أَبْدَانِ الْفُرُوْعِ وَ

وكذلك محمد رحمه الله يأخذ الصفة من الأصل حالة القسمة والعدد من الفروع كما إذا ترك ابني بنت بنت بنت وبنت ابن بنت بنت وبنتي بنت ابن بنت بهذه الصورة

بنت	بنت	بنت
بنت	بنت	ابن
بنت	ابن	بنت
ابنين	بنت	بنتين

عند أبي يوسف رحمه الله يقسم المال بين الفروع أسباعا باعتبار أبدانهم وعند محمد رحمه الله يقسم المال على أعلى الخلاف أعني في البطن الثاني أسباعا باعتبار عدد الفروع في الأصول فعنده أربعة أسباعه لبنتي بنت

وَكَذٰلِكَ عِنْدَ مُحَمَّدٍ رَحِمَهُ اللّٰهُ اِذَا كَانَ اَوْلَادُ الْبَنَاتِ

مُخْتَلِفَةً يُقْسَمُ الْمَالُ عَلَي اَوْلِ بَطْنٍ اخْتَلَفَ فِي الْاُصُولِ

ثُمَّ يُجْعَلُ الذُّكُورُ طَائِفَةً وَالْاِنَاثُ طَائِفَةً اُخْرِي بَعْدَ الْقِسْمَةِ

فَمَا اَصَابَ الذُّكُورَ يُجْمَعُ وَيُقْسَمُ عَلَي اَعْلَي الْخِلَافِ الَّذِي

وَقَعَ فِي اَوْلَادِهِمْ وَكَذٰلِكَ مَا اَصَابَ الْاِنَاثَ وَهٰكَذَا يُعْمَلُ

اِلَي اَنْ يَنْتَهِي بِهٰذِهِ الصُّوْرَةِ

بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	اِبْنٌ	اِبْنٌ
بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ
بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	اِبْنٌ	اِبْنٌ	اِبْنٌ	بِنْتٌ	اِبْنٌ
بِنْتٌ	بِنْتٌ	بِنْتٌ	اِبْنٌ	اِبْنٌ	اِبْنٌ	بِنْتٌ	بِنْتٌ	اِبْنٌ	بِنْتٌ	بِنْتٌ
بِنْتٌ	بِنْتٌ	اِبْنٌ	بِنْتٌ	بِنْتٌ	اِبْنٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	اِبْنٌ	بِنْتٌ
بِنْتٌ	اِبْنٌ	بِنْتٌ	اِبْنٌ	بِنْتٌ	بِنْتٌ	اِبْنٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ	بِنْتٌ

يَعْتَبِرُ أَبْدَانَ الْفُرُوعِ إِنِ اتَّفَقَتْ صِفَةُ الْأُصُولِ مُوَافِقًا لَهُمَا

وَيَعْتَبِرُ أَبْدَانَ الْأُصُولِ إِنِ اخْتَلَفَتْ صِفَاتُهُمْ وَيُعْطِي الْفُرُوعَ

مِيرَاثَ الْأُصُولِ مُخَالِفًا لَهُمَا كَمَا إِذَا تَرَكَ ابْنَ بِنْتٍ وَبِنْتَ بِنْتٍ

عِنْدَهُمَا الْمَالُ بَيْنَهُمَا لِلذَّكَرِ مِثْلُ حَظِّ الْأُنْثَيَيْنِ بِاعْتِبَارِ

الْأَبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ كَذَلِكَ لِأَنَّ صِفَةَ الْأُصُولِ

مُتَّفِقَةٌ وَلَوْ تَرَكَ بِنْتَ ابْنِ بِنْتٍ وَابْنَ بِنْتِ بِنْتٍ عِنْدَهُمَا

الْمَالُ بَيْنَ الْفُرُوعِ اثْلَاثًا بِاعْتِبَارِ الْأَبْدَانِ ثُلُثَاهُ لِلذَّكَرِ

وَثُلُثُهُ لِلْأُنْثَى وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ عَلَيْهِ الْمَالُ بَيْنَ

الْأُصُولِ أَعْنِي فِي الْبَطْنِ الثَّانِي اثْلَاثًا ثُلُثَاهُ لِبِنْتِ ابْنِ

الْبِنْتِ نَصِيبُ أَبِيهَا وَثُلُثُهُ لِابْنِ بِنْتِ الْبِنْتِ نَصِيبُ أُمِّهِ

فَرْعه وَ فَرْعُهُ أَوْلَى مِنْ أَصْلِه)

فَصْلٌ فِي الصِّنْفِ الْأَوَّلِ

أَوْلَهُمْ بِالْمِيرَاثِ أَقْرَبُهُمْ إِلَى الْمَيِّتِ كَبِنْتِ الْبِنْتِ فَإِنَّهَا أَوْلَى مِنْ بِنْتِ بِنْتِ الْإِبْنِ وَإِنِ اسْتَوَوا فِي الدَّرَجَةِ فَوَلَدُ الْوَارِثِ أَوْلَى مِنْ وَلَدِ ذَوِي الْأَرْحَامِ كَبِنْتِ بِنْتِ الْإِبْنِ أَوْلَى مِنِ ابْنِ بِنْتِ الْبِنْتِ وَإِنِ اسْتَوَتْ دَرَجَاتُهُمْ وَلَمْ يَكُنْ فِيهِمْ وَلَدُ الْوَارِثِ أَوْ كَانَ كُلُّهُمْ وَلَدَ الْوَارِثِ فَعِنْدَ أَبِي يُوسُفَ رَحِمَهُ اللَّهُ وَالْحَسَنِ بْنِ زِيَادٍ يُعْتَبَرُ ابْتِدَاءً الْفُرُوعِ وَيُقْسَمُ الْمَالُ عَلَيْهِمْ سَوَاءٌ تَفَقَتْ صِفَةُ الْأُصُولِ فِي الذُّكُورَةِ وَالْأُنُوثَةِ أَوِ اخْتَلَفَتْ وَمُحَمَّدٌ رَحِمَهُ اللَّهُ

محمد رحمه الله يعتبر الجهات في الاصول كما اذا ترك

بنتي بنت بنت وهما أيضا بنتا ابن بنت وابن بنت بنت

بهذه الصورة

بنت	بنت	بنت
بنت	ابن	بنت
بنتين		ابن

عند ابي يوسف المال بينهم اثلاثا وصار البيت كانه ترك

اربع بنات وابنا فيكون ثلثاه للبنتين وثلثه للابن وعند

محمد رحمه الله المال بينهم على ثمانية وعشرين سهما

للبنتين اثنان وعشرون سهما ستة عشر من قبل أبيهما

وستة اسهم من قبل أمهما وللابن ستة اسهم من قبل امه

ابْنِ الْبِنْتِ إِذْهِيَ نَصِيْبُ جَدِّهِمَا وَ ثَلَاثَةُ أَسْبَاعِهِ وَهُوَ

نَصِيْبُ الْبِنْتَيْنِ يُقْسَمُ عَلَي وَلَدَيْهِمَا أَعْنِي فِي الْبَطْنِ

الثَّالِثِ أَضَافَا نِصْفُهُ لِبِنْتِ ابْنِ بِنْتِ الْبِنْتِ نَصِيْبُ

أَبِيْهَا وَ النِّصْفُ الْأَخَرُ لِابْنَيْ بِنْتِ بِنْتِ الْبِنْتِ نَصِيْبُ أُمِّهِمَا

وَ تَصِحُّ مِنْ ثَمَانِيَةٍ وَعِشْرِيْنَ وَ قَوْلُ مُحَمَّدٍ رَحِمَهُ اللّٰهُ اشْهَرُ

الرِّوَايَتَيْنِ عَنْ اَبِيْحَنِيْفَةَ رَحِمَهُ اللّٰهُ فِيْ جَمِيْعِ اَحْكَامِ

ذَوِي الْاَرْحَامِ وَهُوَ قَوْلُ اَبِيْ يُوْسُفَ الْأَوَّلُ ثُمَّ رَجَعَ فَقَالَ

لَاعِبْرَةَ لِلْأُصُوْلِ أَلْبَتَّةَ

فَصْلٌ

عُلَمَاؤُنَا رَحِمَهُمُ اللّٰهُ يَعْتَبِرُوْنَ الْجِهَاتِ فِي التَّوْرِيْثِ غَيْرَانَّ

اَبَا يُوْسُفَ رَحِمَهُ اللّٰهُ يَعْتَبِرُ الْجِهَاتِ فِي اَبْدَانِ الْفُرُوْعِ وَ

وكذلك محمد رحمه الله يأخذ الصفة من الأصل حالة القسمة والعدد من الفروع كما إذا ترك ابني بنت بنت بنت وبنت ابن بنت بنت وبنتي بنت ابن بنت بهذه الصورة

بنت	بنت	بنت
بنت	بنت	ابن
بنت	ابن	بنت
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عند أبي يوسف رحمه الله يقسم المال بين الفروع أسباعا باعتبار أبدانهم وعند محمد رحمه الله يقسم المال على أعلى الخلاف أعني في البطن الثاني أسباعا باعتبار عدد الفروع في الأصول فعنده أربعة أسباعه لبنتي بنت

وكذلك عند محمد رحمه الله اذا كان اولاد البنات

مختلفة يقسم المال على اول بطن اختلف في الاصول

ثم يجعل الذكور طايفة والاناث طايفة اخري بعد القسمة

فما اصاب الذكور يجمع ويقسم على الخلاف الذي

وقع في اولادهم وكذلك ما اصاب الاناث وهكذا يعمل

الي ان ينتهي بهذه الصورة

بنت	بنت	بنت	بنت	بنت	بنت	بنت	بنت	بنت	ابن	ابن
بنت	بنت	بنت	بنت	بنت	بنت	بنت	بنت	بنت	بنت	بنت
بنت	بنت	بنت	بنت	بنت	ابن	ابن	ابن	بنت	بنت	ابن
بنت	بنت	بنت	ابن	ابن	ابن	بنت	بنت	ابن	بنت	بنت
بنت	بنت	ابن	بنت	بنت	ابن	بنت	بنت	بنت	ابن	بنت
بنت	ابن	بنت	ابن	بنت	بنت	بنت	بنت	بنت	بنت	بنت

يُعْتَبَرُ أَبْدَانَ الْفُرُوعِ إِنِ اتَّفَقَتْ صِفَةُ الْأُصُولِ مُوَافِقًا لَهُمَا

وَيَعْتَبِرُ أَبْدَانَ الْأُصُولِ إِنِ اخْتَلَفَتْ صِفَاتُهُمْ وَيُعْطِي الْفُرُوعَ

مِيرَاثَ الْأُصُولِ مُخَالِفًا لَهُمَا كَمَا إِذَا تَرَكَ ابْنَ بِنْتٍ وَبِنْتَ بِنْتٍ

عِنْدَهُمَا الْمَالُ بَيْنَهُمَا لِلذَّكَرِ مِثْلُ حَظِّ الْأُنْثَيَيْنِ بِاعْتِبَارِ

الْأَبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ كَذَلِكَ لِأَنَّ صِفَةَ الْأُصُولِ

مُتَّفِقَةٌ وَلَوْ تَرَكَ بِنْتَ ابْنِ بِنْتٍ وَابْنَ بِنْتِ بِنْتٍ عِنْدَهُمَا

الْمَالُ بَيْنَ الْفُرُوعِ أَثْلَاثًا بِاعْتِبَارِ الْأَبْدَانِ ثُلُثَاهُ لِلذَّكَرِ

وَثُلُثُهُ لِلْأُنْثَى وَعِنْدَ مُحَمَّدٍ رَحِمَهُ اللَّهُ عَلَيْهِ الْمَالُ بَيْنَ

الْأُصُولِ أَعْنِي فِي الْبَطْنِ الثَّانِي أَثْلَاثًا ثُلُثَاهُ لِبِنْتِ ابْنِ

الْبِنْتِ نَصِيبُ أَبِيهَا وَثُلُثُهُ لِابْنِ بِنْتِ الْبِنْتِ نَصِيبُ أُمِّهِ

فَرْعه وَ فَرْعُهُ أَوْلَى مِنْ أَصْلِه)

فَصْلٌ فِي الصِّنْفِ الْأَوَّلِ

أَوْلَهُمْ بِالْمِيرَاثِ أَقْرَبُهُمْ إِلَى الْمَيِّتِ كَبِنْتِ الْبِنْتِ فَإِنَّهَا أَوْلَى مِنْ بِنْتِ بِنْتِ الْإِبْنِ وَإِنِ اسْتَوَوا فِي الدَّرَجَةِ فَوَلَدُ الْوَارِثِ أَوْلَى مِنْ وَلَدِ ذَوِي الْأَرْحَامِ كَبِنْتِ بِنْتِ الْإِبْنِ أَوْلَى مِنِ ابْنِ بِنْتِ الْبِنْتِ وَإِنِ اسْتَوَتْ دَرَجَاتُهُمْ وَلَمْ يَكُنْ فِيهِمْ وَلَدُ الْوَارِثِ أَوْ كَانَ كُلُّهُمْ وَلَدَ الْوَارِثِ فَعِنْدَ أَبِي يُوسُفَ رَحِمَهُ اللَّهُ وَالْحَسَنِ بْنِ زِيَادٍ يُعْتَبَرُ ابْتِدَاءً الْفُرُوعِ وَيُقْسَمُ الْمَالُ عَلَيْهِمْ سَوَاءٌ تَفَقَتْ صِفَةُ الْأُصُولِ فِي الذُّكُورَةِ وَالْأُنُوثَةِ أَوِ اخْتَلَفَتْ وَمُحَمَّدٌ رَحِمَهُ اللَّهُ

يَنْتَهِي إِلَى جَدِّي الْمَيِّتِ أَوْ جَدَّتَيْهِ وَهِيَ الْعَمَّاتُ وَالْأَعْمَامُ

لِأُمٍّ وَالْأَخْوَالُ وَالْخَالَاتُ فَهَؤُلَاءِ وَكُلُّ مَنْ يَدْلِي إِلَى الْمَيِّتِ

بِهِمْ مِنْ ذَوِي الْأَرْحَامِ رَوَى أَبُو سُلَيْمَانَ عَنْ مُحَمَّدِ ابْنِ

الْحَسَنِ عَنْ أَبِي حَنِيفَةَ رَحِمَهُمُ اللَّهُ إِنَّ أَقْرَبَ الْأَصْنَافِ

الصِّنْفُ الثَّانِي وَإِنْ عَلَوْا ثُمَّ الْأَوَّلُ وَإِنْ سَفَلُوا ثُمَّ الثَّالِثُ

وَإِنْ نَزَلُوا ثُمَّ الرَّابِعُ وَإِنْ بَعُدُوا وَرَوَى أَبُو يُوسُفَ وَالْحَسَنُ

بْنُ زِيَادٍ عَنْ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ أَنَّ أَقْرَبَ الْأَصْنَافِ

الْأَوَّلُ ثُمَّ الثَّانِي ثُمَّ الثَّالِثُ ثُمَّ الرَّابِعُ كَتَرْتِيبِ الْعَصَبَاتِ

وَهُوَ الْمَأْخُوذُ لِلْفَتْوَى وَعِنْدَهُمَا الصِّنْفُ الثَّالِثُ مُقَدَّمٌ

عَلَى الْجَدِّ وَالْأُمِّ لِأَنَّ عِنْدَهُمَا كُلَّ وَاحِدٍ مِنْهُمْ أَوْلَى مِنْ

بَابُ ذَوِي الْأَرْحَامِ

وَذُو الرَّحِمِ هُوَ كُلُّ قَرِيبٍ لَيْسَ بِذِي سَهْمٍ وَلَا عَصَبَةٍ كَانَتْ عَامَّةُ الصَّحَابَةِ يَرَوْنَ تَوْرِيثَ ذَوِي الْأَرْحَامِ وَبِهِ قَالَ أَصْحَابُنَا وَمَنْ تَابَعَهُمْ رَحِمَهُمُ اللَّهُ تَعَالَى وَقَالَ زَيْدُ بْنُ ثَابِتٍ رَضِيَ اللَّهُ عَنْهُ لَا مِيرَاثَ لِذَوِي الْأَرْحَامِ وَيُوضَعُ الْمَالُ فِي بَيْتِ الْمَالِ وَبِهِ قَالَ مَالِكٌ وَالشَّافِعِيُّ رَحِمَهُمَا اللَّهُ تَعَالَى وَذَوِي الْأَرْحَامِ أَصْنَافٌ أَرْبَعَةٌ الصِّنْفُ الْأَوَّلُ يَنْتَمِي إِلَى الْمَيِّتِ وَهُمْ أَوْلَادُ الْبَنَاتِ وَأَوْلَادُ الْبَنَاتِ الِابْنِ وَالصِّنْفُ الثَّانِي يَنْتَمِي إِلَيْهِمِ الْمَيِّتُ وَهُمُ الْأَجْدَادُ السَّاقِطُونَ وَالْجَدَّاتُ السَّاقِطَاتُ وَالصِّنْفُ الثَّالِثُ يَنْتَمِي إِلَى أَبَوَيِ الْمَيِّتِ وَهُمْ أَوْلَادُ الْأَخَوَاتِ وَبَنَاتُ الْإِخْوَةِ وَبَنُو الْإِخْوَةِ لِأُمٍّ وَالصِّنْفُ الرَّابِعُ

المماثلة مافي يده من التصحيح الاول على التصحيح
الثاني فلا حاجة الى الضرب وان لم يستقم فانظر ان كان
بينهما موافقة فاضرب وفق التصحيح الثاني في جميع
التصحيح الاول وان كان بينهما مباينة فاضرب كل
التصحيح الثاني في كل التصحيح الاول فالمبلغ مخرج
المسئلتين فسهام ورثة الميت الاول يضرب في المضروب
اعني في التصحيح الثاني اوفي وفقه وسهام ورثة الميت
الثاني يضرب في كل ما في يده اوفي وفقه وان مات
ثالث او رابع فاجعل المبلغ الثاني مقام الاول والثالث
مقام الثاني في العمل ثم في الرابع والخامس كذلك
الى غير النهاية

وتعول إلي تسعةٍ وتصح من سبعةٍ وعشرين إنما سميت
أكدرية لأنها واقعةٌ في امرأةٍ من بني أكدر ولو كان
مكان الأخت أخٌ او اختان فلا عول ولا أكدرية

باب المناسخة

ولو صار بعض الأنصباء ميراثًا قبل القسمة كزوج وبنت
وأم فمات الزوج قبل القسمة عن امرأةٍ وابوين ثم ماتت
البنت عن ابنين وبنت وجدةٍ ثم ماتت الجدة عن زوجٍ
واخوين الاصل فيهان تصحح مسئلة الميت الاول وتعطي
سهام كل وارثٍ من هذا التصحيح ثم تصحح مسئلة
الميت الثاني وتنظر بين ما في يده من التصحيح الاول
وبين التصحيح الثاني الي ثلاثة احوال فان استقام بسبب

لأبٍ وامٍ واما سدس جميع المال كجدٍ وجدةٍ وبنتٍ واخوين
وإذا كان ثلث الباقي خيراً للجد وليس للباقي ثلث
صحيح فاضرب مخرج الثلث في اصل المسئلة فان تركت
جدًّا وزوجًا وبنتًا وأمًّا وأخًا لأبٍ وأمٍّ أو لأبٍ فالسدس خيرٌ
للجد وتعول المسئلة إلى ثلاثة عشر ولا شيء للاخت
واعلم ان زيد بن ثابت رضي الله عنه لا يجعل الاخت
لأبٍ وامٍّ او لأبٍ صاحبة فرضٍ مع الجد الا في المسئلة
الاكدرية وهي زوجٌ وأمٌّ وجدٌّ وأختٌ لأبٍ وأمٍّ أو لأبٍ للزوج
النصف وللامّ الثلث وللجد السدس وللاخت النصف
ثم يضم الجد نصيبه إلى نصيب الاخت فيقسمان للذكر
مثل حظ الانثيين لان المقاسمة خيرٌ للجد اصلها من ستةٍ

بَنُو الْعَلَّاتِ يَدْ خُلُونَ فِي الْقِسْمَةِ مَعَ بَنِي الْأَعْيَانِ

إِضْرَارًا لِلْجَدِّ فَإِذَا أَخَذَ الْجَدُّ نَصِيبَهُ فَبَنُو الْعَلَّاتِ يَخْرُجُونَ

مِنَ الْبَيْنِ خَايِبِينَ بِغَيْرِ شَيْءٍ وَالْبَاقِي لِبَنِي الْأَعْيَانِ

إِلَّا إِذَا كَانَتْ مِنْ بَنِي الْأَعْيَانِ أُخْتٌ وَاحِدَةٌ أَخَذَتْ

فَرْضَهَا أَعْنِي الْكُلَّ بَعْدَ نَصِيبِ الْجَدِّ فَإِنْ بَقِيَ شَيْءٌ

فَلِبَنِي الْعَلَّاتِ وَإِلَّا فَلَا شَيْءَ لَهُمْ وَذٰلِكَ كَجَدٍّ وَأُخْتٍ

لِأَبٍ وَأُمٍّ وَأُخْتَيْنِ لِأَبٍ فَبَقِيَ لِلْأُخْتَيْنِ لِأَبٍ عُشْرُ الْمَالِ وَ

تَصِحُّ مِنْ عِشْرِينَ وَلَوْ كَانَتْ فِي هٰذِهِ الْمَسْأَلَةِ أُخْتٌ لِأَبٍ

لَمْ يَبْقَ لَهَا شَيْءٌ وَإِذَا اخْتَلَطَ بِهِمْ ذَوُو سَهْمٍ فَلِلْجَدِّ هٰهُنَا أَفْضَلُ

الْأُمُورِ الثَّلَاثَةِ بَعْدَ فَرْضِ ذِي سَهْمٍ أَمَّا الْمُقَاسَمَةُ كَزَوْجٍ

وَجَدٍّ وَأَخٍ وَإِمَّا ثُلُثُ مَا يَبْقَى كَجَدٍّ وَجَدَّةٍ وَإِخْوَيْنِ وَأُخْتٍ

من لا يرد عليه فإن انكسر علي البعض صحّح المسئلة بالأصول المذكورة

باب مقاسمة الجدّ

قال أبوبكر الصدّيق رضي الله عنه و من تابعه من الصحابة بنوا الاعيان وبنو العلات لا يرثون مع الجدّ وهذا قول أبي حنيفة رحمه الله وبه يفتي وقال زيد بن ثابت يرثون مع الجدّ و هو قولهما وقول مالك و الشافعي رحمهم الله تعالي وعند زيد بن ثابت رحمة الله تعالي عليه للجدّ مع بني الاعيان و العلات افضل الامرين من المقاسمة و من ثلث جميع المال و تفسير المقاسمة أن يجعل الجدّ في القسمة كاحد من الاخوة و

عدد رؤسهم في مخرج فرض من لا يرد عليه فالمبلغ منها

تصح المسئلة والرابع ان يكون مع الثاني من لا يرد عليه

فاقسم ما بقي من مخرج فرض من لا يرد عليه على

مسئلة من يرد عليه فان استقام الباقي فبها وهذا في

صورة واحدة وهي ان يكون للزوجات الربع ويكون

الباقي بين أهل الرد أ ثلاثا كزوجة وجدة وأختين

لام وان لم يستقم فاضرب جميع مسئلة من يرد عليه في

مخرج فرض من لا يرد عليه فالمبلغ مخرج فروض

الفريقين كأربع زوجات وتسع بنات وست جدات

ثم اضرب سهام من لا يرد عليه في مسئلة من يرد عليه

وسهام كل من يرد عليه فيما بقي من مخرج فرض

وَالثَّانِي إِذَا اجْتَمَعَ فِي الْمَسْئَلَةِ جِنْسَانِ أَوْثَلَاثَةُ أَجْنَاسٍ
مِمَّنْ يَرُدُّ عَلَيْهِ عِنْدَ عَدَمِ مَنْ لَايَرُدُّ عَلَيْهِ فَاجْعَلِ الْمَسْئَلَةَ
مِنْ سِهَامِهِمْ أَعْنِي مِنْ اثْنَيْنِ إِنْ كَانَ فِي الْمَسْئَلَةِ سُدُسَانِ
أَوْمِنْ ثَلَاثَةٍ إِذَا كَانَ فِيهَا ثُلُثٌ وَ سُدُسٌ أَوْمِنْ أَرْبَعَةٍ
إِذَا كَانَ فِيهَانِصْفٌ وَسُدُسٌ أَوْ مِنْ خَمْسَةٍ إِذَا كَانَ فِيهَا
ثُلُثَانِ وَسُدُسٌ أَوْنِصْفٌ وَسُدُسَانِ أَوْ نِصْفٌ وَثُلُثٌ وَالثَّالِثُ
أَنْ يَكُونَ مَعَ الْأَوَّلِ مَنْ لَا يَرُدُّ عَلَيْهِ فَاعْطِ فَرْضَ مَنْ لَا يَرُدُّ
عَلَيْهِ مِنْ أَقَلِّ مَخَارِجِهِ فَإِنِ اسْتَقَامَ الْبَاقِي عَلَي رُؤُسِ
مَنْ يَرُدُّ عَلَيْهِ فَبِهَا كَزَوْجٍ وَثَلَاثِ بَنَاتٍ وَإِنْ لَمْ يَسْتَقِمْ فَاضْرِبْ
وَفْقَ رُؤُسِهِمْ فِي مَخْرَجِ فَرْضِ مَنْ لَا يَرُدُّ عَلَيْهِ أَنْ وَافَقَ
رُؤُسَهُمُ الْبَاقِيْ كَزَوْجٍ وَسِتِّ بَنَاتٍ وَإِلَّا فَاضْرِبْ كُلَّ

بَابُ الرَّدِّ اَلرَّدُّ ضِدُّ الْعَوْلِ

وَهُوَ فِيمَا فَضَلَ عَنْ فَرْضِ ذَوِي الْفُرُوضِ وَلَا مُسْتَحَقَّ لَهُ يُرَدُّ ذٰلِكَ عَلَى ذَوِي الْفُرُوضِ بِقَدْرِ حُقُوقِهِمْ إِلَّا عَلَى الزَّوْجَيْنِ وَهُوَ قَوْلُ عَامَّةِ الصَّحَابَةِ كَعَلِيٍّ وَمَنْ تَابَعَهُ رَضِيَ اللّٰهُ عَنْهُمْ وَبِهِ أَخَذَ أَصْحَابُنَا رَحِمَهُمُ اللّٰهُ وَقَالَ زَيْدُ بْنُ ثَابِتٍ لَا يُرَدُّ الْفَاضِلُ بَلْ هُوَ لِبَيْتِ الْمَالِ وَبِهِ أَخَذَ عُرْوَةُ وَالزُّهْرِيُّ وَمَالِكٌ وَالشَّافِعِيُّ رَحِمَهُمُ اللّٰهُ تَعَالَى ثُمَّ مَسَائِلُ الْبَابِ أَقْسَامٌ أَرْبَعَةٌ أَحَدُهَا أَنْ يَكُونَ فِي الْمَسْئَلَةِ جِنْسٌ وَاحِدٌ مِمَّنْ يُرَدُّ عَلَيْهِ عِنْدَ عَدَمِ مَنْ لَا يُرَدُّ عَلَيْهِ فَاجْعَلِ الْمَسْئَلَةَ مِنْ رُؤُسِهِمْ كَمَا إِذَا تَرَكَ الْمَيِّتُ بِنْتَيْنِ أَوْ أُخْتَيْنِ أَوْ جَدَّتَيْنِ فَاجْعَلِ الْمَسْئَلَةَ مِنْ اثْنَيْنِ

بينهما مباينة فاضرب في كل التركة ثم اقسم الحاصل
على جميع تصحيح المسئلة فالخارج نصيب ذلك
الفريق في الوجهين و أما في قضاء الديون فدين
كل غريم بمنزلة التصحيح

فصل في التخارج

من صالح على شيء من التركة فاطرح سهامه من
التصحيح ثم اقسم باقي التركة على سهام الباقين
كزوج وأم وعم فصالح الزوج على باقي ذمته للزوجة
من المهر وخرج من البين فيقسم باقي التركة بين
الأم والعم اثلاثا بقدر سهامهما وح يكون سهمان للأم و
سهم واحد للعم

فَصْلٌ فِي قِسْمَةِ التَّرِكَاتِ بَيْنَ الْوَرَثَةِ وَ الْغُرَمَاءِ

إِنْكَانَ بَيْنَ التَّرِكَةِ وَالتَّصْحِيحِ مُبَايَنَةٌ فَاضْرِبْ سِهَامَ كُلِّ
وَارِثٍ مِنَ التَّصْحِيحِ فِي جَمِيعِ التَّرِكَةِ ثُمَّ اقْسِمِ الْمَبْلَغَ عَلَى
التَّصْحِيحِ وَإِذَا كَانَ بَيْنَ التَّصْحِيحِ وَالتَّرِكَةِ مُوَافَقَةٌ
فَاضْرِبْ سِهَامَ كُلِّ وَارِثٍ مِنَ التَّصْحِيحِ فِي وَفْقِ التَّرِكَةِ
ثُمَّ اقْسِمِ الْمَبْلَغَ عَلَى وَفْقِ التَّصْحِيحِ فَالْخَارِجُ نَصِيبُ ذَلِكَ
الْوَارِثِ فِي الْوَجْهَيْنِ هٰذَا إِنَّمَا هُوَ لِمَعْرِفَةِ نَصِيبِ كُلِّ
فَرْدٍ مِنَ الْوَرَثَةِ وَأَمَّا لِمَعْرِفَةِ نَصِيبِ كُلِّ فَرِيقٍ مِنْهُمْ
فَاضْرِبْ مَا كَانَ لِكُلِّ فَرِيقٍ مِنْ أَصْلِ الْمَسْأَلَةِ فِي
وَفْقِ التَّرِكَةِ ثُمَّ اقْسِمِ الْمَبْلَغَ الْحَاصِلَ عَلَى وَفْقِ
الْمَسْأَلَةِ إِنْكَانَ بَيْنَ التَّرِكَةِ وَالْمَسْأَلَةِ مُوَافَقَةٌ وَإِنْكَانَ

وَإِذَا أَرَدْتَ أَنْ تَعْرِفَ نَصِيبَ كُلِّ وَاحِدٍ مِنْ أَحَادِ ذٰلِكَ

الْفَرِيقِ مِنَ التَّصْحِيحِ فَاقْسِمْ مَا كَانَ لِكُلِّ فَرِيقٍ مِنْ

أَصْلِ الْمَسْئَلَةِ عَلَى عَدَدِ رُؤُسِهِمْ ثُمَّ اضْرِبِ الْخَارِجَ فِي

الْمَضْرُوبِ فَالْحَاصِلُ نَصِيبُ كُلِّ وَاحِدٍ مِنْ أَحَادِ ذٰلِكَ

الْفَرِيقِ وَوَجْهٌ آخَرُ إِنْ تَقْسِمَ الْمَضْرُوبَ عَلَى أَيِّ شِئْتَ

ثُمَّ تَضْرِبَ الْخَارِجَ فِي نَصِيبِ الْفَرِيقِ الَّذِي قَسَمْتَ

عَلَيْهِمِ الْمَضْرُوبَ فَالْحَاصِلُ نَصِيبُ كُلِّ وَاحِدٍ مِنْ أَحَادِ

ذٰلِكَ الْفَرِيقِ وَوَجْهٌ أَخَرُ وَهُوَ طَرِيقُ النِّسْبَةِ وَهُوَ الْأَوْضَحُ

فَهُوَ أَنْ يُنْسَبَ سِهَامُ كُلِّ فَرِيقٍ مِنْ أَصْلِ الْمَسْئَلَةِ إِلَى

عَدَدِ رُؤُسِهِمْ مُفْرَدًا ثُمَّ يُعْطَى بِمِثْلِ تِلْكَ النِّسْبَةِ مِنَ

الْمَضْرُوبِ لِكُلِّ وَاحِدٍ مِنْ أَحَادِ ذٰلِكَ الْفَرِيقِ

الْمَبْلَغُ فِي أَصْلِ الْمَسْئَلَةِ كَأَرْبَعِ زَوْجَاتٍ وَثَمَانِي عَشَرَةَ بِنْتًا

وَخَمْسَ عَشَرَةَ جَدَّةً وَسِتَّةَ أَعْمَامٍ وَالرَّابِعُ أَنْ تَكُونَ الْأَعْدَادُ

مُتَبَايِنَةً لَا يُوَافِقُ بَعْضُهَا بَعْضًا فَالْحُكْمُ فِيهَا أَنْ يُضْرَبَ أَحَدُ

الْأَعْدَادِ فِي جَمِيعِ الثَّانِي ثُمَّ يُضْرَبُ مَا بَلَغَ فِي جَمِيعِ

الثَّالِثِ ثُمَّ مَا بَلَغَ فِي جَمِيعِ الرَّابِعِ ثُمَّ يُضْرَبُ مَا اجْتَمَعَ

فِي أَصْلِ الْمَسْئَلَةِ كَامْرَأَتَيْنِ وَسِتِّ جَدَّاتٍ وَعَشَرَةِ بَنَاتٍ

وَسَبْعَةِ أَعْمَامٍ

فَصْلٌ

وَإِذَا أَرَدْتَ أَنْ تَعْرِفَ نَصِيبَ كُلِّ فَرِيقٍ مِنَ التَّصْحِيحِ

فَاضْرِبْ مَا كَانَ لِكُلِّ فَرِيقٍ مِنْ أَصْلِ الْمَسْئَلَةِ فِيمَا ضَرَبْتَهُ

فِي أَصْلِ الْمَسْئَلَةِ فَمَا حَصَلَ كَانَ نَصِيبَ ذَلِكَ الْفَرِيقِ

أَصْلِ الْمَسْأَلَةَ كَزَوْجٍ وَخَمْسِ أَخَوَاتٍ لِأَبٍ وَأُمٍّ وَأَمَّا الْأَرْبَعَةُ

فَأَحَدُهَا أَنْ يَكُوْنَ الْكَسْرُ عَلَي طَائِفَتَيْنِ أَوْ أَكْثَرَ وَلَكِنْ

بَيْنَ اَعْدَادِ رُؤُسِهِمْ مِنْهَا ثَلَةٌ فَالْحُكْمُ فِيهَا أَنْ يُضْرَبَ اَحَدُ

الْأَعْدَادِ فِيْ أَصْلِ الْمَسْأَلَةِ مِثْلُ سِتِّ بَنَاتٍ وَثَلْثِ جَدَّاتٍ

وَثَلَاثَةِ اَعْمَامٍ وَالثَّانِيْ أَنْ يَكُوْنَ بَعْضُ الْأَعْدَادِ فِيْ بَعْضِهِ

مُتَدَاخِلًا فَالْحُكْمُ فِيهَا أَنْ يُضْرَبَ أَكْثَرُ الْاَعْدَادِ فِيْ

أَصْلِ الْمَسْأَلَةِ كَأَرْبَعِ زَوْجَاتٍ وَ ثَلَاثِ جَدَّاتٍ وَاثْنَيْ

عَشَرَعَمًّا وَالثَّالِثُ أَنْ يُوَافِقَ بَعْضُ الْاَعْدَادِ بَعْضًا فَالْحُكْمُ

فِيهَا أَنْ يُضْرَبَ وَفْقُ أَحَدِ الْأَعْدَادِ فِيْ جَمِيْعِ الثَّانِيْ ثُمَّ

مَا بَلَغَ فِيْ وَفْقِ الثَّالِثِ إِنْ وَافَقَ الْمَبْلَغَ الثَّالِثَ وَإِلَّا

فَالْمَبْلَغُ فِيْ جَمِيْعِ الثَّالِثِ ثُمَّ فِي الرَّابِعِ كَذٰلِكَ ثُمَّ يُضْرَبُ

بَابُ التَّصْحِيحِ

يُحْتَاجُ فِي تَصْحِيحِ الْمَسَائِلِ الَّتِي سَبْعَةُ أُصُولٍ ثَلَاثَةٌ مِنْهَا بَيْنَ السِّهَامِ وَالرُّؤُسِ وَأَرْبَعَةٌ مِنْهَا بَيْنَ الرُّؤُسِ وَالرُّؤُسِ أَمَّا الثَّلَاثَةُ فَأَحَدُهَا إِنْ كَانَ سِهَامُ كُلِّ فَرِيقٍ مُنْقَسِمَةً عَلَيْهِمْ بِلَا كَسْرٍ فَلَا حَاجَةَ إِلَى الضَّرْبِ كَأَبَوَيْنِ وَبِنْتَيْنِ وَالثَّانِي هُوَ أَنْ يَنْكَسِرَ عَلَى طَائِفَةٍ وَاحِدَةٍ نَصِيبُهُمْ وَلَكِنْ بَيْنَ سِهَامِهِمْ وَرُؤُسِهِمْ مُوَافَقَةٌ فَيُضْرَبُ وَفْقُ عَدَدِ رُؤُسِ مَنِ انْكَسَرَ عَلَيْهِمِ السِّهَامُ فِي أَصْلِ الْمَسْأَلَةِ وَعَوْلِهَا إِنْ كَانَتْ عَائِلَةً كَأَبَوَيْنِ وَعَشْرِ بَنَاتٍ أَوْ زَوْجٍ وَأَبَوَيْنِ وَسِتِّ بَنَاتٍ وَالثَّالِثُ أَنْ يَنْكَسِرَ سِهَامُهُمْ وَلَا يَكُونُ بَيْنَ سِهَامِهِمْ وَرُؤُسِهِمْ مُوَافَقَةٌ فَيُضْرَبُ كُلُّ عَدَدِ رُؤُسِ مَنِ انْكَسَرَ عَلَيْهِمُ السِّهَامُ فِي

الْعَدَدَ الْعَادَّلَهُمَا مَخْرَجُ لِجُزْءِ الْوَفْقِ وَتَبَايُنِ الْعَدَدَيْنِ

٩ اَنْ لَّايَعُدَّ الْعَدَدَيْنِ الْمُخْتَلِفَيْنِ مَعًا عَدَدٌ ثَالِثٌ اَصْلًا

كَالتِّسْعَةِ مَعَ الْعَشَرَةِ وَطَرِيْقُ مَعْرِفَةِ الْمُوَافَقَةِ وَالْمُبَايَنَةِ بَيْنَ

الْعَدَدَيْنِ الْمُخْتَلِفَيْنِ اَنْ يُنْقَصَ مِنَ الْاَكْثَرِ بِمِقْدَارِ

الْاَقَلِّ مِنَ الْخَانَبَيْنِ مَرَّةً اَوْمِرَارًا حَتَّي اتَّفَقَا فِيْ دَرَجَةٍ

وَاحِدَةٍ فَاِنِ اتَّفَقَافِيْ وَاحِدٍفَلَا وَفْقَ بَيْنَهُمَا وَاِنِ اتَّفَقَافِيْ

عَدَدٍ فَهُمَا مُتَوَافِقَانِ فِيْ ذٰلِكَ الْعَدَدِ فَفِي الْاِثْنَيْنِ

بِالنِّصْفِ وَفِي الثَّلَاثَةِ بِالثُّلُثِ وَفِي الْاَرْبَعَةِ بِالرُّبُعِ هٰكَذَا

اِلَي الْعَشَرَةِ وَفِيْهَا وَرَاءَ الْعَشَرَةِ يَتَوَافَقَانِ بِجُزْءٍ اَعْنِي فِيْ

اَحَدَ عَشَرَ بِجُزْءٍ مِنْ اَحَدَ عَشَرَ وَفِيْ خَمْسَةَ عَشَرَ بِجُزْءٍ مِنْ

خَمْسَةَ عَشَرَ فَاعْتَبِرْ هٰذَا

كَامْرَأَةٍ وَامٍّ وَاخْتَيْنِ لِأَبٍ وَأُمٍّ وَاخْتَيْنِ لِأُمٍّ وَابْنٍ مَحْرُومٍ

بَابُ مَعْرِفَةِ التَّمَاثُلِ وَ التَّدَاخُلِ

وَ التَّوَافُقِ وَ التَّبَايُنِ بَيْنَ الْعَدَدَيْنِ

تَمَاثُلُ الْعَدَدَيْنِ كَوْنُ أَحَدِهِمَا مُسَاوِيًا لِلْآخَرِ وَ تَدَاخُلُ الْعَدَدَيْنِ أَنْ يُعَدَّ أَقَلُّهُمَا الْأَكْثَرَ أَيْ يُفْنِيهِ أَوْنَقُولُ تَدَاخُلُ الْعَدَدَيْنِ هُوَ أَنْ يَكُونَ اَكْثَرُ الْعَدَدَيْنِ

منقسما علي الاقل قسمة صحيحة اونقول هوان زيد علي

الْأَقَلِّ مِثْلُهُ أَوْ أَمْثَالُهُ فَيُسَاوِي الْأَكْثَرَ أَوْنَقُولُ أَنْ يَكُونَ

الْأَقَلُّ جُزْءَ الْأَكْثَرِ مِثْلُ ثَلَاثَةٍ وَتِسْعَةٍ وَتَوَافُقُ الْعَدَدَيْنِ اَنْ

لَّا يُعَدَّ أَقَلُّهُمَا الْأَكْثَرَ وَلَكِنْ يُعَدُّهُمَا عَدَدٌ ثَالِثٌ كَالثَّمَانِيَةِ

مَعَ الْعِشْرِيْنَ يُعَدُّهُمَا أَرْبَعَةٌ فَهُمَا مُتَوَافِقَانِ بِالرُّبُعِ لِأَنَّ

بَابُ الْعَوْلِ

أَلْعَوْلُ أَنْ يَزَادَ عَلَي لَمَخْرَجِ شَيْ مِنْ أَجْزَئِهِ اِذَا ضَاقَ
الْمَخْرَجُ عَنْ فَرْضٍ إِعْلَمْ اَنَّ مَجْمُوعَ الْمَخَارِجِ سَبْعَةٌ اَرْبَعَةٌ
مِنْهَالَا تَعُوْلُ وَهِيَ الْإِثْنَانِ وَ الثَّلَاثَةُ وَ الْاَرْبَعَةُ وَ الثَّمَانِيَةُ
وَثَلَثَةٌ مِنْهَا قَدْ تَعُوْلُ أَمَّا السِّتَّةُ فَتَعُوْلُ اِلَي عَشْرٍ وِتْرًا أَوْ شَفْعًا
وَأَمَّا اثْنَي عَشَرَ فَهِيَ تَعُوْلُ اِلَي سَبْعَةَ عَشَرَ وِتْرًا لَا شَفْعًا
وَأَمَّا أَرْبَعَةٌ وَعِشْرُونَ فَاِنَّهَا تَعُوْلُ إِلَي سَبْعَةٍ وَعِشْرِينَ عَوْلًا
وَاحِدًا فِي الْمَسْئَلَةِ الْمِنْبَرِيَّةِ وَهِيَ امْرَأَةٌ وَ بِنْتَانِ وَ اَبَوَانِ
وَ لَايُزَادُ عَلَي هٰذَا إِلَّا عِنْدَ ابْنِ مَسْعُودٍ رَضِيَ اللّٰهُ عَنْهُ
فَاِنَّ عِنْدَهُ تَعُوْلُ اَرْبَعَةٌ وَعِشْرُوْنَ اِلَي إِحْدَي وَ ثَلٰثِينَ

فَاِذَا جَاءَ فِي الْمَسَائِلِ مِنْ هٰذِهِ الْفُرُوضِ أَحَادٌ أَحَادٌ

فَمَخْرَجُ كُلِّ فَرْضٍ سَمِّيهِ اِلَّا النِّصْفَ فَاِنَّهُ مِنَ الْإِثْنَيْنِ

كَالرُّبُعِ مِنْ اَرْبَعَةٍ وَالثُّمُنِ مِنْ ثَمَانِيَةٍ وَ الثُّلُثِ مِنْ

ثَلَاثَةٍ وَ اِذَا جَاءَ مُثَنًّى اَوْ ثُلَاثٌ وَهُمَا مِنْ نَوْعٍ وَاحِدٍ فَكُلُّ

عَدَدٍ يَكُونُ مَخْرَجًا لِجُزْءٍ فَذٰلِكَ الْعَدَدُ اَيْضًا مَخْرَجٌ

لِضِعْفِ ذٰلِكَ الْجُزْءِ وَ لِضِعْفِ ضِعْفِهِ كَالسِّتَّةِ هِيَ

مَخْرَجٌ لِلسُّدُسِ وَ لِضِعْفِهِ وَ اِذَا اخْتَلَطَ النِّصْفُ مِنَ النَّوْعِ

الْأَوَّلِ بِكُلِّ الثَّانِي أَوْ بِبَعْضِهِ فَهُوَ مِنْ سِتَّةٍ وَ إِذَا اخْتَلَطَ

الرُّبُعُ بِكُلِّ الثَّانِي أَوْ بِبَعْضِهِ فَهُوَ مِنْ اِثْنَيْ عَشَرَ وَ اِذَا

اخْتَلَطَ الثُّمُنُ بِكُلِّ الثَّانِي أَوْ بِبَعْضِهِ فَهُوَ مِنْ اَرْبَعَةٍ وَ

عِشْرِينَ

التَّرِكَةِ وَالثَّانِي الْأَقْرَبُ فَالْأَقْرَبُ كَمَا ذَكَرْنَا فِي

العصباتِ والمحروم لا يحجب عندنا وعند ابنِ مسعودٍ

رضي الله عنه يحجب حجب النقصان كالكافرِ

والقاتلِ والرقيقِ والمحجوب يحجب بالإتفاقِ

كالإثنينِ مِنَ الإخوةِ والأخواتِ فصاعدًا مِنْ أيِّ جهةٍ

كانا فإنهما لا يرثانِ مع الأبِ لكن يحجبانِ الأمَّ مِنَ

الثُّلُثِ إلى السُّدُسِ

بابُ مخارجِ الفروضِ

اعلمْ أنَّ الفروضَ الستَّةَ المذكورةَ فيْ كتابِ اللهِ

تعالى نوعانِ الأولُ النِّصفُ والربعُ والثُّمنُ والثَّاني

الثُّلثانِ والثُّلثُ والسُّدسُ على التنصيفِ والتضعيفِ

بَابُ الْحَجْبِ

اَلْحَجْبُ عَلَي نَوعَينِ حَجْبُ نُقصَانٍ وَهُوَحَجْبٌ عَنْ سَهمٍ

إِلَي سَهْمٍ وَذٰلِكَ لِخَمْسَةٍ نَفَرٍ لِلزَّوْجَيْنِ وَالْأُمِّ وَبِنْتِ الْإِبْنِ

وَالْأُخْتِ لِأَبٍ وَقَدْ مَرَّ بَيَانُهُ وَحَجْبُ حِرمَانٍ وَالْوَرَثَةُ فِيهِ

فَرِيقَانِ فَرِيقٌ لَايَحْجِبُونَ بِحَالٍ البَتَّةَ وَهُمْ سِتَّةُ الإِبنِ

وَالْأَبُ وَالزَّوْجُ وَالْبِنْتُ وَالْأُمُّ وَالزَّوْجَةُ وَفَرِيقٌ يَرِثُونَ

بِحَالٍ وَيُحْجَبُونَ بِحَالٍ وَهٰذَا مَبْنِيٌّ عَلَي أَصْلَيْنِ أَحَدُ

هُمَا هُوَاَنَّ كُلَّ مَنْ يَدْلِي إِلَي الْمَيِّتِ بِشَخْصٍ لَايَرِثُ مَعَ

وُجُودِ ذٰلِكَ الشَّخْصِ كَابْنِ الْإِبْنِ مَعَ الْإِبْنِ سِوَي

اَوْلَادِ الْأُمِّ فَإِنَّهُمْ يَرِثُونَ مَعَهَا لِانْعِدَامِ اسْتِحْقَاقِهَا جَمِيعَ

أَوْ أَعْتَقَ مَنْ أَعْتَقْنَ أَوْ كَاتَبَ أَوْ كَاتَبَ مَنْ كَاتَبْنَ
أَوْ دَبَّرَ أَوْ دَبَّرَ مَنْ دَبَّرْنَ أَوْ جَرَّ وَلَاءَ مُعْتَقِهِنَّ وَلَوْ تَرَكَ أَبَا
الْمُعْتِقِ وَابْنَهُ سُدُسُ الْوَلَاءِ لِلْأَبِ وَالْبَاقِي لِلِابْنِ
أَوْ عِنْدَ هُمَا كُلُّهُ لِلِابْنِ وَلَوْ تَرَكَ ابْنَ الْمُعْتِقِ وَجَدَّهُ
فَالْوَلَاءُ كُلُّهُ لِلِابْنِ بِالِاتِّفَاقِ وَمَنْ مَلَكَ ذَا رَحِمٍ مَحْرَمٍ
مِنْهُ عَتَقَ عَلَيْهِ وَيَكُونُ وَلَاؤُهُ لَهُ كَثَلَاثِ بَنَاتٍ لِلصُّغْرَى
عِشْرُونَ دِينَارًا وَلِلْكُبْرَى ثَلَاثُونَ دِينَارًا فَاشْتَرَتَا أَبَاهُمَا
بِالْخَمْسِينَ ثُمَّ مَاتَ الْأَبُ وَتَرَكَ شَيْئًا مِنَ الْمَالِ فَالثُّلُثَانِ
بَيْنَهُنَّ أَثْلَاثًا بِالْفَرْضِ وَالْبَاقِي بَيْنَ مُشْتَرَتَيِ الْأَبِ
أَخْمَاسًا ثَلَاثَةُ أَخْمَاسٍ لِلْكُبْرَى وَخُمْسَاهُ لِلصُّغْرَى
فَتَصِحُّ مِنْ خَمْسَةٍ وَأَرْبَعِينَ

الْحُكْمُ فِيْ أَعْمَامِ الْمَيِّتِ ثُمَّ فِيْ أَعْمَامِ أَبِيْهِ ثُمَّ فِيْ أَعْمَامِ
جَدِّهِ أَمَّا الْعَصَبَةُ بِغَيْرِهِ فَأَرْبَعٌ مِنَ النِّسْوَةِ وَهُنَّ الَّلاتِيْ
فَرْضُهُنَّ النِّصْفُ وَالثُّلُثَانِ يَصِرْنَ عَصَبَةً بِإِخْوَتِهِنَّ
كَمَا ذَكَرْنَا فِيْ حَالَاتِهِنَّ وَمَنْ لَافَرْضَ لَهَا مِنَ الْإِنَاثِ
وَأَخُوْهَا عَصَبَةٌ لَاتَصِيْرُ عَصَبَةً بِأَخِيْهَا كَالْعَمِّ وَالْعَمَّةِ
وَأَمَّا الْعَصَبَةُ مَعَ غَيْرِهِ فَكُلُّ أُنْثَى تَصِيْرُ عَصَبَةً مَعَ أُنْثَى
أُخْرَى كَالْأُخْتِ مَعَ الْبِنْتِ كَمَا ذَكَرْنَا وَآخِرُ الْعَصَبَاتِ
مَوْلَى الْعَتَاقَةِ ثُمَّ عَصَبَتُهُ عَلَى التَّرْتِيْبِ الَّذِيْ ذَكَرْنَا
لِقَوْلِهِ عَلَيْهِ الصَّلٰوةُ وَالسَّلَامُ الْوَلَاءُ لُحْمَةٌ كَلُحْمَةِ النَّسَبِ
وَلَاشَيْءَ لِلْإِنَاثِ مِنْ وَرَثَةِ الْمُعْتِقِ لِقَوْلِهِ عَلَيْهِ الصَّلٰوةُ
وَالسَّلَامُ لَيْسَ لِلنِّسَاءِ مِنَ الْوَلَاءِ شَيْءٌ إِلَّا مَا اعْتَقْنَ

واصله وجزء ابيهِ وجزء جدهِ الاقرب فالاقرب يرجحون

بِقُرْبِ الدَّرَجَةِ أَعْنِي بِهِ أَوْلَادَهُمْ بِالْمِيرَاثِ جُزْءُ الْمَيِّتِ

أَيِ الْبَنُونَ ثُمَّ بَنُوهُمْ وَإِنْ سَفَلُوا ثُمَّ أَصْلُهُ أَيِ الْأَبِ ثُمَّ الْجَدِّ

أَبِ الْأَبِ وَإِنْ عَلَا ثُمَّ جُزْءُ أَبِيهِ أَيِ الْأُخْوَةِ ثُمَّ بَنُوهُمْ

وَإِنْ سَفَلُوا ثُمَّ جُزْءُ جَدِّهِ اي الْأَعْمَامِ ثُمَّ بَنُوهُمْ وَإِنْ سَفَلُوا

ثُمَّ يُرَجَّحُونَ بِقُوَّةِ الْقَرَابَةِ أَعْنِي بِهِ ذَا الْقَرَابَتَيْنِ أَوْلَى

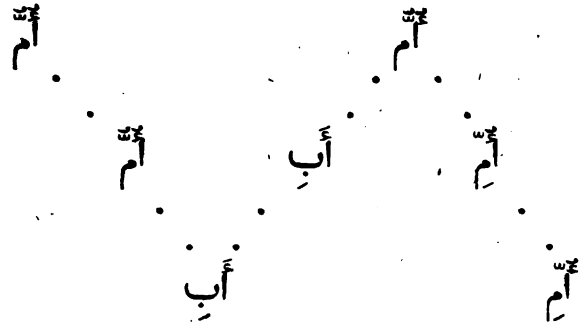
مِنْ ذِي قَرَابَةٍ وَاحِدَةٍ ذَكَرًا كَانَ أَوْ أُنْثَى لِقَوْلِهِ

عَلَيْهِ السَّلَامُ إِنَّ أَعْيَانَ بَنِي الْأَبِ وَالْأُمِّ يَتَوَارَثُونَ دُونَ

بَنِي الْعَلَّاتِ كَالْأَخِ لِأَبٍ وَأُمٍّ أَوْلَى مِنَ الْأَخِ لِأَبٍ وَالْأُخْتُ

لِأَبٍ وَأُمٍّ إِذَا صَارَتْ عَصَبَةً مَعَ الْبِنْتِ أَوْ لَى مِنَ الْأَخِ لِأَبٍ

وَابْنُ الْأَخِ لِأَبٍ وَأُمٍّ أَوْلَى مِنَ ابْنِ الْأَخِ لِأَبٍ وَكَذَلِكَ



يَقْسَمُ السُّدْسُ بَيْنَهُمَا عِنْدَ اَبِيْ يُوْسُفَ رَحْمَةُ اللّٰهِ عَلَيْهِ

اَنْصَافًا بِاعْتِبَارِ الْاَبْدَانِ وَعِنْدَ مُحَمَّدٍ رَحْمَةُ اللّٰهِ عَلَيْهِ

اَثْلَاثًا بِاعْتِبَارِ الْجِهَاتِ

بَابُ الْعَصَبَاتِ

اَلْعَصَبَاتُ النَّسَبِيَّةُ ثَلَاثَةٌ عَصَبَةٌ بِنَفْسِهِ وَ عَصَبَةٌ بِغَيْرِهِ

وَ عَصَبَةٌ مَعَ غَيْرِهِ أَمَّا الْعَصَبَةُ بِنَفْسِهِ فَكُلُّ ذَكَرٍ لَا يَدْخُلُ

فِيْ نِسْبَتِهِ اِلَى الْمَيِّتِ اُنْثَى وَهِيَ أَرْبَعَةُ اَصْنَافٍ جُزْءُ الْمَيِّتِ

وابوبنِ اوزوجة وابوبنِ ولوكان مكان الابِ جدٌّ فللامّ
ثلث جميعِ المالِ الا عندابي يوسف رحمه الله فان لها
ايضاً ثلث الباقي وللجدّة السدس لامّ كانت اولابٍ
واحدةً كانت اواكثر اذا كنّ ثابتاتٍ متحاذياتٍ
في الدرجةِ ويسقطن كلّهنّ بالامّ والابو يّات ايضاً
بالابِ وكذلك بالجدّ الامّ الابِ وان علت فانها ترث
مع الجدّ لانها ليست من قبلهِ والجدّة القربي من اي
جهةٍ كانت تحجب الجدة البعدي من اي جهةٍ
كانت و ارثةً كانت القربي او محجوبة واذا كانت
الجدّة ذات قرابةٍ واحدةٍ كام ام الابِ والاخري ذات
قرابتين اواكثر كام ام الامّ وهي ايضاً ام ابِ الابِ
بهذهِ الصورةِ

لِأَبٍ وَأُمٍّ وَلَهُنَّ السُّدُسُ مَعَ الْأُخْتِ لِأَبٍ وَأُمٍّ تَكْمِلَةً
لِلثُّلُثَيْنِ وَلِلْبِنْتِ مَعَ الْأُخْتَيْنِ لِأَبٍ وَأُمٍّ إِلَّا أَنْ يَكُونَ
مَعَهُنَّ أَخٌ لِأَبٍ فَيُعَصِّبُهُنَّ وَيَكُونُ الْبَاقِي بَيْنَهُنَّ لِلذَّكَرِ
مِثْلُ حَظِّ الْأُنْثَيَيْنِ وَالسَّادِسَةُ أَنْ يَصِرْنَ عَصَبَةً مَعَ الْبَنَاتِ
أَوْ مَعَ بَنَاتِ الِابْنِ لَهَا ذَكَرٌ نَا وَبَنُو الْأَعْيَانِ وَبَنُو الْعَلَّاتِ
كُلُّهُمْ يَسْقُطُونَ بِالِابْنِ وَابْنِ الِابْنِ وَإِنْ سَفَلَ وَبِالْأَبِ
بِالِاتِّفَاقِ وَبِالْجَدِّ عِنْدَ أَبِي حَنِيفَةَ رَحِمَهُ اللَّهُ تَعَالَى
وَيَسْقُطُ بَنُو الْعَلَّاتِ أَيْضًا بِالْأَخِ لِأَبٍ وَأُمٍّ وَأَمَّا لِلْأُمِّ فَأَحْوَالُ
ثَلَاثٌ السُّدُسُ مَعَ الْوَلَدِ أَوْ وَلَدِ الِابْنِ وَإِنْ سَفَلَ أَوْ مَعَ الِاثْنَيْنِ
مِنَ الْإِخْوَةِ وَالْأَخَوَاتِ فَصَاعِدًا مِنْ أَيِّ جِهَةٍ كَانَا
وَثُلُثُ الْكُلِّ عِنْدَ عَدَمِ هَؤُلَاءِ الْمَذْكُورِينَ وَثُلُثُ مَا بَقِيَ
بَعْدَ فَرْضِ أَحَدِ الزَّوْجَيْنِ وَذَلِكَ فِي مَسْأَلَتَيْنِ زَوْجٌ

الأَوَّلِ اَلنِّصْفُ وَلِلْوَسْطَي مِنَ الْفَرِيْقِ الْأَوَّلِ مَعَ
مَنْ يُوَازِيْهَا السُّدُسُ تَكْمِلَةً لِلثُّلُثَيْنِ وَ لَا شَيْءَ
لِلسِّفْلِيَّاتِ اَصْلًا اِلَّا اَنْ يَكُوْنَ مَعَهُنَّ غُلَامٌ فَيُعَصِّبُهُنَّ
مَنْ كَانَتْ بِحَذَائِهِ وَ مَنْ كَانَتْ فَوْقَهُ لَهُنَّ لَمْ يَكُنْ
ذَاتَ سَهْمٍ وَ يَسْقُطُ مَنْ دُوْنَهُ وَ اَمَّا الْأَخَوَاتُ لِأَبٍ وَاُمٍّ
فَاَحْوَالٌ خَمْسٌ اَلنِّصْفُ لِلْوَاحِدَةِ وَالثُّلُثَانِ لِلْاِثْنَيْنِ
فَصَاعِدًا وَ مَعَ الْاَخِ لِأَبٍ وَ اُمٍّ لِلذَّكَرِ مِثْلُ حَظِّ الْأُنْثَيَيْنِ
فَيَصِرْنَ بِهِ عَصَبَةً لِاسْتِوَآئِهِمْ فِي الْقَرَابَةِ اِلَي الْمَيِّتِ
وَلَهُنَّ الْبَاقِيْ مَعَ الْبَنَاتِ أَوْبَنَاتِ الْاِبْنِ لِقَوْلِهِ عَلَيْهِ الصَّلٰوةُ
وَ السَّلَامُ اِجْعَلُوا الْأَخَوَاتِ مَعَ الْبَنَاتِ عَصَبَةً وَ الْأَخَوَاتُ
لِأَبٍ كَالْأَخَوَاتِ لِأَبٍ وَاُمٍّ وَ لَهُنَّ أَحْوَالٌ سَبْعٌ اَلنِّصْفُ
لِلْوَاحِدَةِ وَ الثُّلُثَانِ لِلْاِثْنَيْنِ فَصَاعِدًا عِنْدَ عَدَمِ الْأَخَوَاتِ

اِبْنٌ بِنْتٌ . . . . . اِبْنٌ . . . . . اِبْنٌ

اِبْنٌ بِنْتٌ . . . . . اِبْنٌ بِنْتٌ . . . . . اِبْنٌ

اِبْنٌ بِنْتٌ . . . . . اِبْنٌ بِنْتٌ . . . . . اِبْنٌ بِنْتٌ

اِبْنٌ بِنْتٌ . . . . . اِبْنٌ بِنْتٌ

اِبْنٌ بِنْتٌ

اَلْعُلْيَا مِنَ الْغَرِيْقِ اْلاَ وَّ لِ لِاْيُوَازِ يْهَا اَحَدٌ وَالْوُسْطَي

مِنَ الْغَرِيْقِ اْلاَوَّ لِ تُوَازِ يْهَا الْعُلْيَامِنَ الْغَرِ يْقِ الثَّانِيْ

وَ السُّفْلَي مِنَ الْغَرِ يْقِ اْلاَ وَّ لِ تُوَا زِ يْهَا اْلوَ سْطَي

مِنَ الْغَرِ يْقِ الثَّانِيْ وَ الْعُلْيَا مِنَ الْغَرِ يْقِ الثَّالِثِ

وَالسُّفْلَي مِنَ الْغَرِ يْقِ الثَّانِيْ تُوَا زِ يْهَا الْوَ سْطَي

مِنَ الْغَرِ يْقِ الثَّالِثِ وَالسُّفْلَي مِنَ الْغَرِ يْقِ الثَّا لِثِ

لَايُوَازِيْهَأَ احَدٌ اِذَاعَرَ فْتَهٰذَافَنَقُوْلُ لِلْعُلْيَا مِنَ الْغَرِ يْقِ

كَبَنَاتِ الصُّلْبِ وَلَهُنَّ أَحْوَالُ سِتِّ النِّصْفُ لِلْوَاحِدَةِ
وَالثُّلُثَانِ لِلْاثْنَيْنِ فَصَاعِدًا عِنْدَ عَدَمِ بَنَاتِ الصُّلْبِ
وَلَهُنَّ السُّدُسُ مَعَ الْوَاحِدَةِ الصُّلْبِيَّةِ تَكْمِلَةً لِلثُّلُثَيْنِ
وَلَا يَرِثْنَ مَعَ الصُّلْبِيَّتَيْنِ إِلَّا أَنْ يَكُونَ بِحِذَائِهِنَّ أَوْ أَسْفَلَ
مِنْهُنَّ غُلَامٌ فَيُعَصِّبُهُنَّ وَالْبَاقِي بَيْنَهُنَّ لِلذَّكَرِ مِثْلُ
حَظِّ الْأُنْثَيَيْنِ وَيَسْقُطْنَ كُلُّهُنَّ بِالْإِبْنِ وَلَوْ تَرَكَ ثَلَاثَ
بَنَاتِ ابْنٍ بَعْضُهُنَّ أَسْفَلُ مِنْ بَعْضٍ وَثَلَاثَ بَنَاتِ ابْنِ
ابْنٍ آخَرَ بَعْضُهُنَّ أَسْفَلُ مِنْ بَعْضٍ وَثَلَاثَ بَنَاتِ ابْنِ
ابْنِ ابْنٍ آخَرَ بَعْضُهُنَّ أَسْفَلُ مِنْ بَعْضٍ بِهٰذِهِ الصُّورَةِ
وَتُسَمَّى مَسْئَلَةَ التَّشْبِيبِ

الْفَرِيقُ الْأَوَّلُ	الْفَرِيقُ الثَّانِي	الْفَرِيقُ الثَّالِثُ
ابْنٌ	ابْنٌ	ابْنٌ

فَأَحْوَالُ ثُلُثُ السُّدُسِ لِلْوَاحِدِ وَالثُّلُثُ لِلْاِثْنَيْنِ فَصَاعِدًا

ذُكُورُهُمْ وَإِنَاثُهُمْ فِي الْقِسْمَةِ وَالْاِسْتِحْقَاقِ سَوَآءٌ

وَيَسْقُطُونَ بِالْوَلَدِ وَوَلَدِ الْاِبْنِ وَإِنْ سَفَلَ وَبِالْأَبِ

وَبِالْجَدِّ بِالْاِتِّفَاقِ وَأَمَّا لِلزَّوْجِ فَحَالَتَانِ النِّصْفُ

عِنْدَ عَدَمِ الْوَلَدِ وَوَلَدِ الْاِبْنِ وَإِنْ سَفَلَ وَالرُّبُعُ

مَعَ الْوَلَدِ أَوْ وَلَدِ الْاِبْنِ وَإِنْ سَفَلَ

فَصْلٌ فِي النِّسَآءِ

لِلزَّوْجَاتِ حَالَتَانِ الرُّبُعُ لِلْوَاحِدَةِ فَصَاعِدًا عِنْدَ عَدَمِ

الْوَلَدِ وَوَلَدِ الْاِبْنِ وَإِنْ سَفَلَ وَالثُّمُنُ مَعَ الْوَلَدِ

أَوْوَلَدِ الْاِبْنِ وَإِنْ سَفَلَ وَأَمَّا لِبَنَاتِ الصُّلْبِ فَأَحْوَالُ ثَلٰثٌ

النِّصْفُ لِلْوَاحِدَةِ وَالثُّلُثَانِ لِلْاِثْنَيْنِ فَصَاعِدًا وَمَعَ الْاِبْنِ

لِلذَّكَرِ مِثْلُ حَظِّ الْاُنْثَيَيْنِ وَهُوَ يُعَصِّبُهُنَّ وَبَنَاتُ الْاِبْنِ

ـ النِّصْفُ لِلْوَاحِدَةِ

عَدَمِ بَنَاتِ الصُّلْبِ

ـلْبِيَّةِ تَكْمِلَةً لِلثُّلُثَيْنِ

ـكُونَ بِحِذَائِهِنَّ اَوْاَسْفَلَ

ـ بَيْنَهُنَّ لِلذَّكَرِ مِثْلُ

بِالْإِبْنِ وَلَوْتَرَكَ ثَلٰثَ

بَعْضٍ وَثَلَاثَ بِنَاتِ ابْنِ

بَعْضٍ وَثَلَاثَ بِنَاتِ ابْنِ

مِنْ بَعْضٍ بِهٰذِهِ الصُّوْرَةِ

الثَّانِيْ وَالْفَرِيْقُ الثَّالِثُ

اِبْنٌ . . . . . اِبْنٌ

مُصِرًّا عَلَى إِقْرَارِهِ ثُمَّ الْمُوصَى لَهُ بِجَمِيعِ الْمَالِ ثُمَّ

فَصْلٌ فِي الْمَوَانِعِ مِنَ الْإِرْثِ

اَلْمَانِعُ مِنَ الْإِرْثِ اَرْبَعَةٌ الرِّقُّ وَاخْتِلَافُ الدِّينَيْنِ وَاخْتِلَافُ الدَّارَيْنِ اَمَّا حَقِيقَةً

وَالذِّمِّيُّ اَوْ حُكْمًا كَالْمُسْتَأْمَنِ مِنْ وَالِدٍ مِيِّ

مِنْ دَارَيْنِ مُخْتَلِفَيْنِ وَالدَّارُ إِرَا

بِاخْتِلَافِ الْمَنَعَةِ وَالْمَلِكِ لِانْقِطَاعِ الْعِصَ

بَابُ مَعْرِفَةِ الْفُرُوضِ وَمُسْتَ

اَلْفُرُوضُ الْمُقَدَّرَةُ فِي كِتَابِ اللّٰهِ تَعَالَى

وَالرُّبُعُ وَالثُّمُنُ وَالثُّلُثَانِ وَالثُّلُثُ وَالـ

التَّصْعِيفُ وَالتَّنْصِيفُ وَاَصْحَابُ هٰذِهِ السِّهَا

نفرا اربعة من الرجال وهم الاب والجد الصحيح
وان علا والاخ لام والزوج وثمان من النساء وهن الزوجة
والبنت وبنت الابن وان سفلت والاخت لاب وام
والاخت لاب والاخت لام والام والجدة الصحيحة
وهي التي لا يدخل في نسبتها الي الميت جد فاسد
اما اللاتي بفاحوال ثلث الفرض المطلق وهو السدس
وذلك مع الابن او ابن الابن وان سفل والفرض
والتعصيب معا وذلك مع الابنة او ابنة الابن وان سفلت
والتعصيب المحض وذلك عند عدم الولد وولد الابن
وان سفل والجد الصحيح كالاب الا في اربع مسايل
وسنذكرها انشاء الله تعالي ويسقط الجد بالاب
لان الاب اصل في قرابة الجد الي الميت واما الاولاد الام

مُصِرًّا عَلَى إِقْرَارِهِ ثُمَّ الْمُوصَى لَهُ بِجَمِيعِ الْمَالِ ثُمَّ بَيْتُ الْمَالِ

فَصْلٌ فِي الْمَوَانِعِ مِنَ الْإِرْثِ

اَلْمَانِعُ مِنَ الْإِرْثِ اَرْبَعَةٌ الرِّقُّ وَاِفْرَاكَانَ أَوْنَاقِصًا وَالْقَتْلُ الَّذِي يَتَعَلَّقُ بِهِ وُجُوبُ الْقِصَاصِ اَوِ الْكَفَّارَةِ وَاخْتِلَافُ الدِّينَيْنِ وَاخْتِلَافُ الدَّارَيْنِ اِمَّاحَقِيقَةً كَالْحَرْبِيِّ وَالذِّمِّيِّ اَوْحُكْمًا كَالْمُسْتَأْمَنِ مِنْ وَالِدِ مِيِّ اَوِالْحَرْبِيَّيْنِ مِنْ دَارَيْنِ مُخْتَلِفَيْنِ وَالدَّ اِرَانِهَا تَخْتَلِفُ بِاخْتِلَافِ الْمَنْعَةِ وَالْهَلَكِ لِانْقِطَاعِ الْعِصْمَةِ فِيهَا بَيْنَهُمْ

بَابُ مَعْرِفَةِ الْفُرُوضِ وَمُسْتَحِقِّيهَا

اَلْفُرُوضُ الْمُقَدَّرَةُ فِي كِتَابِ اللَّهِ تَعَالَى سِتَّةُ النِّصْفُ وَالرُّبُعُ وَالثُّمُنُ وَالثُّلُثَانِ وَالثُّلُثُ وَالسُّدُسُ عَلَى التَّضْعِيفِ وَالتَّنْصِيفِ وَأَصْحَابُ هٰذِهِ السِّهَامِ اثْنَي عَشَرَ

AN

ESSAY

ON

THE LAW OF BAILMENTS.

In tutelis, societatibus, *fiduciis*, *mandatis*, rebus emptis-venditis, *conductis-locatis*, quibus vitæ societas continetur, magni est judicis statuere (præsertim cùm in plerisque sint judicia contraria), *quid quemque cuique præstare* oporteat.

Q. Scævola, apud Cic. de Offic. lib. III.

وَتَكْفِينِهِ بِلَاتَبْذِيرٍ وَلَاتَقْتِيرٍ ثُمَّ يَقْضِي دُيُونَهُ مِنْ
جَمِيعِ مَابَقِيَ مِنْ مَالِهِ ثُمَّ تُنْفَذُ وَصَايَاهُ مِنْ ثُلُثِ
مَا بَقِيَ بَعْدَالدَّيْنِ ثُمَّ يُقْسَمُ الْبَاقِي بَيْنَ وَرَثَتِهِ
بِالْكِتَابِ وَالسُّنَّةِ وَ اِجْمَاعِ الْأُمَّةِ فَيَبْدَاءُ بِأَصْحَابِ
الْفَرَائِضِ وَهُمُ الَّذِينَ لَهُمْ سِهَامٌ مُقَدَّرَةٌ فِي كِتَابِ
اللّٰهِ تَعَالَي ثُمَّ بِالْعَصَبَاتِ مِنْ جِهَةِ النَّسَبِ وَالْعَصَبَةُ
كُلُّ مَنْ يَأْخُذُ مِنَ التَّرِكَةِ مَا أَبْقَتْهُ أَصْحَابُ الْفَرَائِضِ
وَ عِنْدَالْاِنْفِرَادِ يَحْرُزُ جَمِيعَ الْمَالِ ثُمَّ بِالْعَصَبَةِ مِنْ
جِهَةِ السَّبَبِ وَهُوَمَوْلَي الْعِتَاقَةِ ثُمَّ عَصَبَتُهُ ثُمَّ الرَّدُّ
عَلَي ذَوِي الْفُرُوضِ النَّسَبِيَّةِ بِقَدْرِ حُقُوقِهِمْ ثُمَّ ذَوِي
الْأَرْحَامِ ثُمَّ مَوْلَي الْمُوَالَاةِ ثُمَّ الْمُقَرُّ لَهُ بِالنَّسَبِ عَلَي الْغَيْرِ
بِحَيْثُ لَمْ يَثْبُتْ نَسَبُهُ مِنْ ذٰلِكَ الْغَيْرِ اِذَا مَاتَ الْمُقِرُّ

بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِيْمِ

اَلْحَمْدُ لِلّٰهِ رَبِّ الْعٰلَمِيْنَ حَمْدَ الشَّاكِرِيْنَ وَالصَّلٰوةُ

عَلٰى خَيْرِ الْبَرِيَّةِ مُحَمَّدٍ وَّاٰلِهِ الطَّيِّبِيْنَ قَالَ رَسُوْلُ اللّٰهِ

صَلَّى اللّٰهُ عَلَيْهِ وَسَلَّمَ تَعَلَّمُوا الْفَرَائِضَ وَعَلِّمُوْهَا النَّاسَ

فَاِنَّهَا نِصْفُ الْعِلْمِ قَالَ عُلَمَاؤُنَا رَحِمَهُمُ اللّٰهُ يَتَعَلَّقُ

بِتَرِكَةِ الْمَيِّتِ حُقُوْقٌ اَرْبَعَةٌ مُرَتَّبَةٌ الْاَوَّلُ يَبْدَءُ بِتَجْهِيْزِهِ

the moſt correct and beautiful outline, that ever was exhibited of any human ſcience; but they alone will no more form a lawyer, than a general map of the world, how accurately and elegantly ſoever it may be delineated, will make a geographer: if, indeed, all the titles, which he profeſſed only to ſketch in elementary diſcourſes, were filled up with exactneſs and perſpicuity, *Engliſhmen* might hope at length to poſſeſs a digeſt of their laws, which would leave but little room for controverſy, except in caſes depending on their particular circumſtances; a work, which every lover of humanity and peace muſt anxiouſly wiſh to ſee accompliſhed. The following eſſay (for it aſpires to no higher name) will explain my idea of ſupplying the omiſſions, whether deſigned or involuntary, in the Commentaries on the Laws of ENGLAND.

I propoſe to begin with treating the ſubject *analytically*, and, having traced every part of it up to the firſt principles of natural reaſon, ſhall proceed *hiſtorically*, to ſhow with what perfect harmony thoſe principles are recogniſed and eſtabliſhed by other nations, eſpecially the ROMANS, as well as by our ENGLISH courts, when their deciſions are properly underſtood and clearly diſtinguiſhed; after which I ſhall reſume *ſynthetically* the whole learning of *bailments*, and expound ſuch rules, as, in my humble appre-

other part, perhaps, of juridical learning; at leaſt, than any other part equally ſimple.

Such being the caſe, I could not help imagining, that a ſhort and perſpicuous diſcuſſion of this title, an expoſition of all our ancient and modern deciſions concerning it, an attempt to reconcile judgments apparently diſcordant, and to illuſtrate our laws by a compariſon of them with thoſe of other nations, together with an inveſtigation of their true ſpirit and reaſon, would not be wholly unacceptable to the ſtudent of *Engliſh* law; eſpecially as our excellent BLACKSTONE, who of all men was beſt able to throw the cleareſt light on this, as on every other, ſubject, has compriſed the whole doctrine in three paragraphs, which, without affecting the merit of his incomparable work, we may ſafely pronounce the leaſt ſatisfactory part of it; for he repreſents *lending* and *letting to hire*, which are *bailments* by his own definition, as contracts of *a diſtinct ſpecies*; he ſays nothing of employment by *commiſſion*; he introduces the doctrine of a *diſtreſs*, which has an analogy to a *pawn*, but is not properly *bailed*; and, on the great queſtion of *reſponſibility for neglect*, he ſpeaks ſo looſely and indeterminately, that no fixed ideas can be collected from his words*. His commentaries are

* 2. Comm. 452, 453, 454.

and, by obſerving the different manners and characters of men, we may find a certain ſtandard, which will greatly facilitate our inquiry; for, although ſome are exceſſively careleſs, and others exceſſively vigilant, and ſome through life, others only at particular times, yet we may perceive, that *the generality of rational men* uſe nearly the ſame degree of diligence in the conduct of *their own* affairs; and this care, therefore, which *every perſon of common prudence and capable of governing a family* takes of *his own* concerns, is a proper meaſure of that, which would uniformly be required in performing every contract, if there were not ſtrong reaſons for *exacting* in ſome of them a *greater*, and *permitting* in others a *leſs*, degree of attention. Here then we may fix a conſtant determinate point, on each ſide of which there is a ſeries conſiſting of variable terms tending indefinitely towards the above-mentioned extremes, in proportion as the caſe admits of indulgence or demands rigour: if the conſtruction be *favourable*, a degree of care *leſs* than the ſtandard will be ſufficient; if *rigorous*, a degree *more* will be required; and, in the firſt caſe, the meaſure will be that care, which *every man of common ſenſe, though abſent and inattentive*, applies to his own affairs; in the ſecond, the meaſure will be that

attention, which a man *remarkably exact and thoughtful* gives to the ſecuring of his perſonal property.

The fixed mode or ſtandard of diligence I ſhall (for want of an apter epithet) invariably call ORDINARY; although that word is equivocal, and ſometimes involves a notion of degradation, which I mean wholly to exclude; but the unvaried uſe of the word in one ſenſe will prevent the leaſt obſcurity. The degrees on each ſide of the ſtandard, being indeterminate, need not be diſtinguiſhed by any preciſe denomination: the firſt may be called LESS, and the ſecond, MORE, THAN ORDINARY diligence.

Superlatives are exactly true in mathematicks; they approach to truth in abſtract morality; but in practice and actual life they are commonly falſe: they are often, indeed, uſed for mere *intenſives*, as *the* MOST *diligent* for VERY *diligent*; but this is a rhetorical figure; and, as rhetorick, like her ſiſter poetry, delights in fiction, her language ought never to be adopted in ſober inveſtigations of truth: for this reaſon I would reject from the preſent inquiry all ſuch expreſſions as *the utmoſt care*, *all poſſible*, or *all imaginable*, *diligence*, and the like, which have been the cauſe of many errors in the code of ancient ROME, whence, as it will ſoon be demonſtrated,

they have been introduced into our books even of high authority.

Juſt in the ſame manner, there are infinite ſhades of *default* or *neglect*, from the ſlighteſt inattention or momentary abſence of mind to the moſt reprehenſible ſupineneſs and ſtupidity: theſe are the omiſſions of the before-mentioned degrees of diligence, and are exactly correſpondent with them. Thus the omiſſion of that care, *which every prudent man takes of his own property*, is the determinate point of negligence, on each ſide of which is a ſeries of variable modes of default infinitely diminiſhing, in proportion as their oppoſite modes of care infinitely increaſe; for the want of extremely great care is an extremely little fault, and the want of the ſlighteſt attention is ſo conſiderable a fault, that it almoſt changes its nature, and nearly becomes in theory, as it exactly does in practice, a breach of truſt and a deviation from common honeſty. This known, or fixed, point of negligence, is therefore a mean between *fraud* and *accident*; and, as the increaſing ſeries continually approaches to the firſt extreme, without ever becoming preciſely equal to it, until the laſt term melts into it or vaniſhes, ſo the decreaſing ſeries continually approximates to the ſecond extreme, and at length becomes nearer to it than any aſſignable difference: but the laſt terms be-

ing, as before, excluded, we muſt look within them for modes applicable to practice; and theſe we ſhall find to be the omiſſions of ſuch care as *a man of common ſenſe, however inattentive*, and of ſuch as a *very cautious and vigilant* man, reſpectively take of *their own poſſeſſions.*

The conſtant, or fixed, mode of *default* I likewiſe call ORDINARY, not meaning by that epithet to diminiſh the culpability of it, but wanting a more appoſite word, and intending to uſe this word uniformly in the ſame ſenſe: of the two variable modes the firſt may be called GREATER, and the ſecond, LESS, THAN ORDINARY, or the firſt GROSS, and the other, SLIGHT neglect.

It is obvious, that a bailee of common honeſty, if he alſo have common prudence, would not be *more* negligent *than ordinary* in keeping the thing bailed: ſuch negligence (as we before have intimated) would be a violation of good faith, and a proof of an intention to defraud and injure the bailor.

It is not leſs obvious, though leſs pertinent to the ſubject, that infinite degrees of *fraud* may be conceived increaſing in a ſeries from the term where *groſs neglect* ends, to a term, where poſitive *crime* begins; as *crimes* likewiſe proceed gradually from the lighteſt to the moſt atrocious; and, in the ſame manner, there are infinite degrees of *accident* from the limit of extremely ſlight ne-

gleƈt to a *force irreſiſtible* by any human power. Law, as a practical ſcience, cannot take notice of melting lines, nice diſcriminations, and evaneſcent quantities; but it does not follow, that *neglect*, *deceit*, and *accident*, are to be conſidered as indiviſible points, and that *no degrees whatever* on either ſide of the ſtandard are admiſſible in legal diſquiſitions.

Having diſcovered the ſeveral modes of *diligence*, which may juſtly be demanded of contracting parties, let us inquire in what particular caſes a bailee is by natural law bound to uſe them, or to be anſwerable for the omiſſion of them.

When the contract is *reciprocally beneficial to both parties*, the obligation hangs in an even balance; and there can be no reaſon to recede from the ſtandard: nothing more, therefore, ought in that caſe to be required than *ordinary diligence*, and the bailee ſhould be reſponſible for no more than *ordinary neglect*; but it is very different, both in reaſon and policy, when *one* only of the contracting parties derives advantage from the contract.

If the *bailor only* receive benefit or convenience from the bailment, it would be hard and unjuſt to require any particular trouble from the *bailee*, who ought not to be moleſted unneceſſarily for his obliging conduct: if more, therefore, than

good faith were exacted from ſuch a perſon, that is, if he were to be made anſwerable for leſs than *groſs* neglect, few men after one or two examples, would accept goods on ſuch terms, and ſocial comfort would be proportionably impaired.

On the other hand, when the *bailee alone* is benefited or accommodated by his contract, it is not only reaſonable, that he, *who receives the benefit, ſhould bear the burden*, but, if he were not obliged to be *more than ordinarily* careful, and bound to anſwer even for *ſlight* neglect, few men (for acts of pure generoſity and friendſhip are not here to be ſuppoſed) would part with their goods for the mere advantage of another, and much convenience would conſequently be loſt in civil ſociety.

This diſtinction is conformable not only to natural reaſon, but alſo, by a fair preſumption, to the *intention of the parties*, which conſtitutes the genuine law of all contracts, when it contravenes no maxim of morals or good government; but, when a different intention is *expreſſed*, the rule (as in deviſes) yields to it; and a bailee without benefit may, by a ſpecial undertaking, make himſelf liable for *ordinary*, or *ſlight*, neglect, or even for inevitable *accident:* hence, as an agreement, *that a man may ſafely be diſhoneſt*, is repugnant to decency and morality, and, as no

man ſhall be *preſumed* to bind himſelf againſt *irreſiſtible force*, it is a juſt rule, that *every* bailee is reſponſible for *fraud*, even *though* the contrary be ſtipulated, but that *no* bailee is reſponſible for *accident*, *unleſs* it be moſt expreſsly ſo agreed.

The plain elements of natural law, on the ſubject of reſponſibility for neglect, having been traced by this ſhort analyſis, I come to the ſecond, or *hiſtorical*, part of my eſſay; in which I ſhall demonſtrate, after a few introductory remarks, that a perfect harmony ſubſiſts on this intereſting branch of juriſprudence in the codes of nations moſt eminent for legal wiſdom, particularly of the ROMANS and the ENGLISH.

Of all known laws the moſt ancient and venerable are thoſe of the JEWS; and among the *Moſaick* inſtitutions we have ſome curious rules on the very ſubject before us; but, as they are not numerous enough to compoſe a ſyſtem, it will be ſufficient to interweave them as we go along, and explain them in their proper places: for a ſimilar reaſon, I ſhall ſay nothing here of the *Attick* laws on this title, but ſhall proceed at once to that nation, by which the wiſdom of ATHENS was eclipſed, and her glory extinguiſhed.

The deciſions of the old *Roman* lawyers, collected and arranged in the ſixth century by the order of JUSTINIAN, have been for ages, and in

ſome degree ſtill are, in bad odour among *Engliſhmen:* this is an honeſt prejudice, and flows from a laudable ſource; but a prejudice, moſt certainly, it is, and, like all others, may be carried to a culpable exceſs.

The conſtitution of ROME was originally excellent; but, when it was *ſettled*, as hiſtorians write, *by* AUGUSTUS, or, in truer words, when that baſe diſſembler and cold-blooded aſſaſſin *C. Octavius* gave law to millions of honeſter, wiſer, and braver men than himſelf by the help of a profligate army and an abandoned ſenate, the new form of government was in itſelf abſurd and unnatural; and the *lex regia*, which concentrated in the prince all the powers of the ſtate both executive and legiſlative, was a tyrannous ordinance, with the name only, not the nature, of a law*; had it even been voluntarily conceded, as it was in truth forcibly extorted, it could not have bound the *ſons* of thoſe who conſented to it; for "a renunciation of *perſonal* rights, eſpe-"cially rights of the higheſt nature, can have "no operation beyond the *perſons* of thoſe, who "renounce them." Yet, iniquitous and odious as the *ſettlement* of the conſtitution was, ULPIAN only ſpoke in conformity to it, when he ſaid that "the will of the prince had the force

* D. 1. 4. 1.

" of law;" that is, as he afterwards explains himſelf, *in the* ROMAN *empire*; for he neither meaned, nor could be mad enough to mean, that the propoſition was juſt or true as a general maxim. So congenial, however, was this rule or ſentence, ill underſtood and worſe applied, to the minds of our early NORMAN kings, that ſome of them, according to Sir JOHN FORTESCUE, " were not pleaſed with their own laws, but ex- " erted themſelves to introduce the civil laws " of *Rome* into the government of ENGLAND*;" and ſo hateful was it to our ſturdy anceſtors, that, if JOHN of SALISBURY be credited, " they burned " and tore all ſuch books of civil and canon law " as fell into their hands†:" but this was intemperate zeal; and it would have been ſufficient to improbate the *publick*, or *conſtitutional*, maxims of the *Roman* imperial law, as abſurd in themſelves as well as inapplicable to our free government, without rejecting the whole ſyſtem of *private* juriſprudence as incapable of anſwering even the purpoſe of illuſtration. Many *poſitive* inſtitutions of the *Romans* are demonſtrated by FORTESCUE, with great force, to be far ſurpaſſed in juſtice and ſenſe by our own immemorial cuſtoms; and the reſcripts of SEVERUS or CARACALLA, which were laws, it ſeems, at *Rome*,

* *De* Laud. Leg. Angl. *c.* 33. 34. † Seld. *in* Fort. c. 33.

have certainly no kind of authority at *Weſtminſter*; but, in queſtions of *rational* law, no cauſe can be aſſigned, why we ſhould not ſhorten our own labour by reſorting occaſionally to the wiſdom of ancient juriſts, many of whom were the moſt ingenious and ſagacious of men. What is good ſenſe, in one age, muſt be good ſenſe, all circumſtances remaining, in another; and pure unſophiſticated reaſon is the ſame in ITALY and in ENGLAND, in the mind of a PAPINIAN and of a BLACKSTONE.

Without undertaking, therefore, in all inſtances, to reconcile NERVA with PROCULUS, LABEO with JULIAN, and GAIUS either with CELSUS or with himſelf, I ſhall proceed to exhibit a ſummary of the *Roman* law on the ſubject of *reſponſibility for neglect*.

The two great ſources, whence all the deciſions of civilians in this matter muſt be derived, are *two* laws of ULPIAN; the firſt of which is taken from his work on *Sabinus*, and the ſecond from his tract on the Edict: of both theſe laws I ſhall give a verbal tranſlation according to my apprehenſion of their obvious meaning, and ſhall then ſtate a very learned and intereſting controverſy concerning them, with the principal arguments on each ſide, as far as they tend to elucidate the queſtion before us.

"Some contracts, ſays the great writer on *Sabinus*,

" make the party reſponſible for DECEIT ONLY;
" ſome, for both DECEIT AND NEGLECT. No-
" thing more than *reſponſibility for* DECEIT *is*
" *demanded* in DEPOSITS and POSSESSION AT
" WILL; both DECEIT AND NEGLECT are *in-*
" *hibited* in COMMISSIONS, LENDING FOR
" USE, CUSTODY AFTER SALE, TAKING IN
" PLEDGE, HIRING; alſo in PORTIONS, GUAR-
" DIANSHIPS, VOLUNTARY WORK: (among
" theſe SOME *require* even *more than ordinary*
" DILIGENCE). PARTNERSHIP and UNDI-
" VIDED PROPERTY make *the partner and joint-*
" *proprietor* anſwerable for both DECEIT AND
" NEGLIGENCE*."

" In contracts, ſays the ſame author in his
" other work, we are ſometimes reſponſible for
" DECEIT ALONE; ſometimes, for NEGLECT
" ALSO; for DECEIT ONLY in DEPOSITS; be-
" cauſe, ſince NO BENEFIT accrues to the de-
" poſitary, he can juſtly be anſwerable for no
" more than DECEIT; but, if a REWARD hap-
" pen to be given, then *a reſponſibility for* NE-
" GLECT ALSO is required; or, if it be agreed

* Contractûs quidam DOLUM malum DUNTAXAT recipiunt; quidam, et DOLUM ET CULPAM. DOLUM tantùm DEPOSITUM et PRECARIUM; DOLUM ET CULPAM, MANDATUM, COMMODATUM, VENDITUM, PIGNORI ACCEPTUM, LOCATUM; item DOTISDATIO, TUTELÆ, NEGOTIA GESTA: (in his QUIDAM et DILIGENTIAM). SOCIETAS et RERUM COMMUNIO et DOLUM ET CULPAM recipit. D. 50. 17. 23.

" at the time of the contract, that the depositary " shall answer both for NEGLECT and for ACCI- " DENT: but, where A BENEFIT accrues to " BOTH parties, as in KEEPING A THING " SOLD, as in HIRING, as in PORTIONS, as in " PLEDGES, as in PARTNERSHIP, both DE- " CEIT AND NEGLECT make the party liable. " LENDING FOR USE, indeed, is for the most " part BENEFICIAL to the BORROWER ONLY; " and, for this reason, the better opinion is that " of Q. MUCIUS, who thought, that HE should " be responsible not only for NEGLECT, but " even for the omission of *more than ordinary* " DILIGENCE*."

One would scarce have believed it possible, that there could have been two opinions on laws so perspicuous and precise, composed by the same writer, who was indubitably the best expositor

* In contractibus interdum DOLUM SOLUM, interdum ET CULPAM, præstamus; DOLUM in DEPOSITO; nam, quia NULLA UTILITAS ejus versatur, apud quem deponitur, merito DOLUS præstatur SOLUS; nisi fortè et MERCES accessit, tunc enim, ut est et constitutum, ETIAM CULPA exhibetur; aut, si hoc ab initio convenit, ut et CULPAM et PERICULUM præstet is, penes quem deponitur: sed, ubi UTRIUSQUE UTILITAS vertitur, ut in EMPTO, ut in LOCATO, ut in DOTE, ut in PIGNORE, ut in SOCIETATE, et DOLUS ET CULPA præstatur. COMMODATUM autem plerumque SOLAM UTILITATEM continet ejus, CUI COMMODATUR; et ideò verior est Q. MUCII sententia existimantis et CULPAM præstandam et DILIGENTIAM. D. 13. 6. 5. 2.

of his own doctrine, and apparently written in illuſtration of each other; the firſt compriſing the rule, and the ſecond containing the reaſon of it: yet the ſingle paſſage extracted from the book on SABINUS has had no fewer than twelve particular commentaries in *Latin**, one or two in *Greek*†, and ſome in the *modern* languages of EUROPE, beſides the general expoſitions of that important part of the digeſt, in which it is preſerved. Moſt of theſe I have peruſed with more admiration of human ſagacity and induſtry than either ſolid inſtruction or rational entertainment; for theſe authors, like the generality of commentators, treat one another very roughly on very little provocation, and have the art rather of clouding texts in themſelves clear, than of elucidating paſſages, which have any obſcurity in the words or the ſenſe of them. CAMPANAS, indeed, who was both a lawyer and a poet, has turned the firſt law of *Ulpian* into *Latin* hexameters; and his authority, both in proſe and verſe, confirms the interpretation, which I have juſt given.

The chief cauſes of all this perplexity have been, firſt, the vague and indiſtinct manner in which the old *Roman* lawyers, even the moſt

*BOCERUS, CAMPANUS, D'AVEZAN, DEL RIO, LE CONTE, RITTERSHUSIUS, GIPHANIUS, J. GODEFROI, and others.

† The ſcholium on *Harmenopulus*, l. 6. tit. de Reg. Jur. n. 15. may be conſidered as a commentary on this law.

eminent, have written on the ſubject; ſecondly, the looſe and equivocal ſenſe of the words DILIGENTIA and CULPA; laſtly and principally, the darkneſs of the parenthetical clauſe IN HIS QUIDAM ET DILIGENTIAM, which has produced more doubt, as to its true reading and ſignification, than any ſentence of equal length in any author *Greek* or *Latin*. Minute as the queſtion concerning this clauſe may ſeem, and dry as it certainly is, a ſhort examination of it appears abſolutely neceſſary.

The vulgate editions of the pandects, and the manuſcripts, from which they were printed, exhibit the reading above ſet forth; and it has accordingly been adopted by CUJAS, P. FABER, LE CONTE, DONELLUS, and *moſt* others, as giving a ſenſe both perſpicuous in itſelf and conſiſtent with the ſecond law; but the FLORENTINE copy has *quidem*, and the copies, from which the *Baſilica* were tranſlated three centuries after JUSTINIAN, appear to have contained the ſame word, ſince the *Greeks* have rendered it by a particle of ſimilar import. This variation in a ſingle letter makes a total alteration in the whole doctrine of ULPIAN; for, *if* it be agreed, that *diligentia* means, by a figure of ſpeech, *a more than ordinary degree of diligence*, the common reading will imply, conformably with the ſecond law before cited, that "SOME of the pre-

" ceding contracts demand that higher degree;" but the *Florentine* reading will denote, in contradiction to it, that " ALL of them require more " than ordinary exertions."

It is by no means my deſign to depreciate the authority of the venerable manuſcript preſerved at *Florence*; for, although few civilians, I believe, agree with POLITIAN, in ſuppoſing it to be one of the *originals*, which were ſent by *Juſtinian* himſelf to the principal towns of *Italy**, yet it may *poſſibly* be the very book, which the Emperor LOTHARIUS II. is *ſaid* to have found at *Amalfi* about the year 1130, and gave to the citizens of PISA, from whom it was taken, near three hundred years after, by the *Florentines*, and has been kept by them with ſuperſtitious reverence †: be that as it may, the copy deſerves the higheſt reſpect; but, if any proof be requiſite, that it is *no faultleſs* tranſcript, we may obſerve, that, in the very law before us, *accedunt* is erroneouſly written for *accidunt*; and the whole phraſe, indeed, in which that word occurs, is different from the copy uſed by the *Greek* interpreters, and conveys a meaning, as BOCERUS and others have remarked, not ſupportable by any principle or analogy.

* Epiſt. x. 4. Miſcell. cap. 41. See Gravina, lib. i. § 141.
† Taurelli, Præf. ad Pand. Florent.

This, too, is indiſputably clear; that the ſentence *in his* QUIDEM *et diligentiam*, is ungrammatical, and cannot be conſtrued according to the interpretation, which ſome contend for. What verb is underſtood? *Recipiunt.* What noun? *Contractûs.* What then becomes of the words *in his*, namely *contractibus*, unleſs *in* ſignify *among?* And, in that caſe, the difference between QUIDEM and QUIDAM vaniſhes; for the clauſe may ſtill import, that "AMONG the preceding con-"tracts (that is, *in* SOME *of them)*, more than "uſual diligence is exacted:" in this ſenſe the *Greek* prepoſition ſeems to have been taken by the ſcholiaſt on HARMENOPULUS; and it may here be mentioned, that *diligentia*, in the nominative, appears in ſome old copies, as the *Greeks* have rendered it; but ACCURSIUS, DEL RIO, and a few others, conſider the word as implying no more than diligence *in general*, and diſtinguiſh it into various *degrees* applicable to the ſeveral contracts, which ULPIAN enumerates. We may add, that one or two interpreters thus explain the whole ſentence, "in his *contractibus* qui-"dam *juriſconſulti* et diligentiam *requirunt*," but this interpretation, if it could be admitted, would entirely deſtroy the authority of the clauſe, and imply, that *Ulpian* was of a different opinion. As to the laſt conjecture, that only *certain caſes* and *circumſtances* are meaned by the word QUIDAM, it ſcarce de-

ſerves to be repeated. On the whole, I ſtrongly incline to prefer the vulgate reading, eſpecially as it is not conjectural, but has the authority of manuſcripts to ſupport it; and the miſtake of a letter might eaſily have been made by a tranſcriber, whom the prefaces, the epigram prefixed, and other circumſtances, prove to have been, as *Taurelli* himſelf admits, a *Greek*.—Whatever, in ſhort, be the genuine words of this much-controverted clauſe, I am perſuaded, that it ought by no means to be ſtrained into an inconſiſtency with the *ſecond* law; and this has been the opinion of *moſt* foreign juriſts from Azo and ALCIAT down to HEINECCIUS and HUBER; who, let their diſſenſion be, on other points, ever ſo great, think alike in diſtinguiſhing *three degrees* of neglect, which we may term *groſs*, *ordinary*, and *ſlight*, and in demanding reſponſibility for thoſe degrees according to the rule before expounded.

The law then on this head, which prevailed in the ancient *Roman* empire, and ſtill prevails in *Germany*, *Spain*, *France*, *Italy*, *Holland*, conſtituting, as it were, a part of the law of nations, is in ſubſtance what follows.

Groſs neglect, *lata culpa*, or, as the *Roman* lawyers moſt accurately call it, *dolo proxima*, is in practice conſidered as equivalent to DOLUS, or FRAUD, itſelf; and conſiſts, according to the beſt interpreters, in the *omiſſion* of that care,

which even inattentive and thoughtleſs men never fail to take of their own property: this fault they juſtly hold a violation of *good faith.*

Ordinary neglect, *levis culpa,* is the *want* of that diligence, which the *generality of mankind uſe in their own concerns*; that is, of *ordinary care.*

Slight neglect, *leviſſima culpa,* is the *omiſſion* of that care, which *very attentive and vigilant perſons take of their own goods,* or, in other words, of *very exact diligence.*

Now, in order to aſcertain the degree of neglect, for which a man, who has in his poſſeſſion the goods of another, is made reſponſible by his contract, either *expreſs* or *implied,* civilians eſtabliſh *three* principles, which they deduce from the law of *Ulpian* on the *Edict*; and here it may be obſerved, that they frequently diſtinguiſh this law by the name of *Si ut certo,* and the other by that of *Contractus**; as many poems and hiſtories in ancient languages are denominated from their *initial* words.

Firſt: In contracts, which are beneficial *ſolely* to the owner of the property holden by another,

* Or l. 5. § 2. ff. *Commod.* and l. 23. ff. *de reg. jur.* Inſtead of *ff*, which is a barbarous corruption of the initial letter of παν δέκται, many write D, for *Digeſt*, with more clearneſs and propriety.

no more is demanded of the holder than *good faith*, and he is conſequently reſponſible for nothing leſs than *groſs* neglect: this, therefore, is the general rule in DEPOSITS; but, in regard to COMMISSIONS, or, as foreigners call them, MANDATES, and the *implied* contract *negotiorum geſtorum*, a certain care is requiſite from *the nature of the thing*; and, as *good faith* itſelf demands, that ſuch care be proportioned to the exigence of each particular caſe, the law *preſumes*, that the mandatary or commiſſioner, and, by parity of reaſon, the *negotiorum geſtor*, engaged at the time of contracting to uſe a degree of diligence *adequate to the performance of the work undertaken**.

Secondly: In contracts *reciprocally* beneficial to *both* parties, as in thoſe of SALE, HIRING, PLEDGING, PARTNERSHIP, and the contract implied in JOINT-PROPERTY, ſuch care is exacted, as *every prudent man commonly takes of his own goods*; and, by conſequence, the *vendor*, the *hirer*, the *taker in pledge*, the *partner*, and the *co-proprietor*, are anſwerable for *ordinary* neglect.

Thirdly: In contracts, from which a benefit accrues *only* to him, who has the goods in his

* *Spondet diligentiam*, ſay the *Roman* lawyers, *gerendo negotio parem*.

cuſtody, as in that of LENDING FOR USE, an *extraordinary* degree of care is demanded; and the *borrower* is, therefore, reſponſible for *ſlight* negligence.

This had been the learning generally, and almoſt unanimouſly, received and taught by the doctors of *Roman* law; and it is very remarkable, that even ANTOINE FAVRE, or *Faber*, who was famed for innovation and paradox, who publiſhed two ample volumes *De Erroribus Interpretum*, and whom GRAVINA juſtly calls *the boldeſt of expoſitors and the keeneſt adverſary of the practiſers**, diſcovered no error in the common interpretation of two celebrated laws, which have ſo direct and ſo powerful an influence over ſocial life, and which he muſt repeatedly have conſidered: but the younger GODEFROI of *Geneva*, a lawyer confeſſedly of eminent learning, who died about the middle of the laſt century, left behind him a regular *commentary* on the law *Contractus*, in which he boldly combats the ſentiments of all his predeceſſors, and even of the ancient *Romans*, and endeavours to ſupport a new ſyſtem of his own.

He adopts, in the firſt place, the *Florentine* reading, of which the ſtudent, I hope, has

* Orig. Jur. Civ. lib. i. § 183.

formed by this time a decided opinion from a preceding page of this eſſay.

He cenſures the rule compriſed in the law *Si ut certo* as weak and fallacious, yet admits, that the rule, which He condemns, had the approbation and ſupport of MODESTINUS, of PAULUS, of AFRICANUS, of GAIUS, and of the great PAPINIAN himſelf; nor does he ſatisfactorily prove the *fallaciouſneſs*, to which he objects, unleſs every rule be fallacious, to which there are ſome exceptions. He underſtands by DILIGENTIA that care, which *a very attentive and vigilant man* takes of his own property; and he demands this care in *all* the eight contracts, which immediately precede the diſputed clauſe: in the *two*, which follow it, he requires no more than *ordinary* diligence. He admits, however, the *three* degrees of neglect above ſtated, and uſes the common epithets *levis* and *leviſſima*; but, in order to reconcile his ſyſtem with many laws, which evidently oppoſe it, he aſcribes to the old lawyers the wildeſt mutability of opinion, and is even forced to contend, that ULPIAN himſelf *muſt have changed his mind.*

Since his work was not publiſhed, I believe, in his life-time, there may be reaſon to ſuſpect, that he had not completely ſettled *his own* mind; and he concludes, indeed, with referring the deciſion of every caſe on this head to that moſt

dangerous and moſt tremendous power, *the diſcretion of the judge**.

The *triple* diviſion of neglects had alſo been highly cenſured by ſome lawyers of reputation. ZASIUS had very juſtly remarked, that neglects differed in *degree*, but not in *ſpecies*; adding, "that he had no objection to uſe the words "*levis* and *leviſſima*, merely as terms of practice "adopted in courts, for the more eaſy diſtinction "between the different degrees of care ex-"acted in the performance of different con-"tracts†:" but DONELLUS, in oppoſition to his maſter *Duaren*, inſiſted that *levis* and *leviſſima* differed in ſound only, not in ſenſe; and attempted to prove his aſſertion triumphantly by a regular ſyllogiſm‡; the minor propoſition of which is raiſed on the figurative and inaccurate manner, in which poſitives are often uſed for ſuperlatives, and converſely, even by the beſt of the old *Roman* lawyers. True it is, that, in the law *Contractus*, the diviſion appears to be

* "Ego certè hac in re cenſentibus accedo, vix quidquam "generaliùs definiri poſſe; remque hanc ad *arbitrium judicis*, "prout res eſt, referendam." p. 141.

† ZAS. *Singul. Reſp.* lib. i. cap. 2.

‡ "Quorum definitiones eædem ſunt, ea inter ſe ſunt "eadem; *levis* autem culpæ et *leviſſimæ* una et eadem defi-"nitio eſt; utraque igitur culpa eadem." Comm. Jur. Civ. lib. xvi. cap. 7.

two-fold only, DOLUS and CULPA; which differ in *ſpecies*, when the firſt means *actual fraud and malice*, but in *degree* merely, when it denotes no more than *groſs neglect*; and, in either caſe, the ſecond branch, being capable of *more* and *leſs*, may be ſubdivided into *ordinary* and *ſlight*; a ſubdiviſion, which the law *Si ut certo* obviouſly requires: and thus are both laws perfectly reconciled.

We may apply the ſame reaſoning, changing what ſhould be changed, to the *triple* diviſion of *diligence*; for, when *good faith* is conſidered as implying at leaſt the exertion of *ſlight* attention, the other branch, *Care*, is ſubdiviſible into *ordinary* and *extraordinary*; which brings us back to the number of degrees already eſtabliſhed both by the analyſis and by authority.

Nevertheleſs, a ſyſtem, in one part entirely new, was broached in the preſent century by an advocate in the parliament of PARIS, who may, probably, be now living, and, poſſibly, in that profeſſional ſtation, to which his learning and acuteneſs juſtly entitle him. I ſpeak of M. LE BRUN, who publiſhed, not many years ago, an *Eſſay on Reſponſibility for Neglect**, which he

* *Eſſai ſur la Preſtation des Fautes*, à Paris, chez Saugrain, 1764.

had nearly finiſhed, before he had ſeen the commentary of *Godefroi*, and, in all probability, without ever being acquainted with the opinion of *Donellus*.

This author ſharply reproves the *triple* diviſion of neglects, and ſeems to diſregard the rule concerning a benefit ariſing to *both*, or to *one*, of the contracting parties; yet he charges *Godefroi* with a want of due clearneſs in his ideas, and with a palpable miſinterpretation of ſeveral laws. He reads *in his quidem et diligentiam*; and that with an air of triumph; inſinuating, that *quidam* was only an artful conjecture of *Cujas* and *Le Conte*, for the purpoſe of eſtabliſhing *their* ſyſtem; and he ſupports *his own* reading by the authority of the BASILICA; an authority, which, on another occaſion, he depreciates. He derides the abſurdity of *permitting negligence* in any contract, and urges, that ſuch *permiſſion*, as he calls it, is againſt expreſs law: "now, "ſays he, where a contract is beneficial to both "parties, the doctors permit *ſlight* negligence, "which, how ſlight ſoever, is ſtill *negligence*, "and ought always to be inhibited." He warmly contends, that the ROMAN laws, properly underſtood, admit only *two* degrees of diligence; one, meaſured by that, which *a provident and attentive father of a family* uſes in his own concerns; another, by that care, which

the *individual party*, of whom it is required, is *accuſtomed to take of his own poſſeſſions*; and he, very ingeniouſly, ſubſtitutes a new rule in the place of that, which he rejects; namely, that, *when the things in queſtion are the* SOLE *property of the perſon, to whom they muſt be reſtored*, the holder of them is obliged to keep them with the *firſt* degree of diligence; whence he decides, that a *borrower* and a *hirer* are reſponſible for preciſely the ſame neglect; that a vendor, who retains for a time the cuſtody of the goods ſold, is under the ſame obligation, in reſpect of care, with a man, who undertakes to manage the affairs of another, either *without* his requeſt, as a *negotiorum geſtor*, or *with* it, as a *mandatary:* "but, ſays he, *when* "*the things are the* JOINT *property of the parties* "*contracting*, no higher diligence can be required "than the ſecond degree, or that, which the "*acting party* commonly uſes in *his own* affairs; "and it is ſufficient, *if he keep them, as he keeps* "*his own.*" This he conceives to be the diſtinction between the *eight* contracts, which precede, and the *two*, which follow, the words *in his quidem et diligentiam.*

Throughout his work he diſplays no ſmall ſagacity and erudition, but ſpeaks with too much confidence of his own deciſions, and with too much aſperity or contempt of all other interpreters from BARTOLUS to VINNIUS.

At the time when this author wrote, the learned M. POTHIER was compoſing ſome of his admirable *treatiſes* on all the different ſpecies of expreſs, or implied, *contracts*; and here I ſeize with pleaſure an opportunity of recommending thoſe treatiſes to the *Engliſh* lawyer, exhorting him to read them again and again; for, if his great maſter LITTLETON has given him, as it muſt be preſumed, a taſte for luminous method, appoſite examples, and a clear manly ſtyle, in which nothing is redundant, nothing deficient, he will ſurely be delighted with works, in which all thoſe advantages are combined, and the greateſt portion of which is law at *Weſtminſter* as well as at *Orleans**: for my own part, I am ſo charmed with them, that, if my undiſſembled fondneſs for the ſtudy of juriſprudence were never to produce any greater benefit to the publick, than barely the introduction of POTHIER to the acquaintance of my countrymen, I ſhould think that I had in ſome meaſure diſcharged the debt, which *every man*, according to lord COKE, *owes to his profeſſion.*

To this venerable profeſſor and judge, for he had ſuſtained both characters with deſerved applauſe, LE BRUN ſent a copy of his little work;

* *Oeuvres de M. Pothier*, à Paris, chez DEBURE: 28 volumes in *duodecimo*, or 6 in *quarto*. The illuſtrious author died in 1772.

and M. POTHIER honoured it with a ſhort, but complete, anſwer in the form of a *General Obſervation on his Treatiſes**; declaring, at the ſame time, that *he would not enter into a literary conteſt*, and apologizing for his fixed adherence to the ancient ſyſtem, which he politely aſcribes to *the natural bias of an old man in favour of opinions formerly imbibed.* This is the ſubſtance of his anſwer: "that he can diſcover no kind of ab-
"ſurdity in the uſual diviſion of *neglect* and *di-*
"*ligence*, nor in the *rule*, by which different *de-*
"*grees* of them are applied to different con-
"tracts; that to ſpeak with ſtrict propriety,
"negligence is not *permitted* in any contract,
"but *a leſs rigorous conſtruction* prevails in ſome
"than in others; that a *hirer*, for inſtance, is
"not conſidered as *negligent*, when he takes the
"ſame care of the goods hired, which the ge-
"nerality of mankind take of their own; that
"the *letter to hire*, who has his reward, muſt be
"preſumed to have demanded at firſt no higher
"degree of diligence, and cannot juſtly complain
"of that *inattention*, which in another caſe might
"have been culpable; for a *lender*, who has *no*
"reward, may fairly exact from the borrower
"that *extraordinary* degree of care, which *a very*

* It is printed apart, in *fourteen* pages, at the end of his treatiſe on the *Marriage-contract*.

" *attentive perſon of his age and quality* would " certainly have taken; that the diligence, which " *the* INDIVIDUAL *party commonly uſes in his* " *own affairs*, cannot properly be the object of " judicial inquiry; for *every* truſtee, adminiſtra- " tor, partner, or co-proprietor, muſt be *pre-* " *ſumed* by the court, auditors, or commiſſioners, " before whom an account is taken, or a diſtri- " bution or partition made, to uſe in *their own* " concerns ſuch diligence, as is commonly uſed " by *all prudent men*; that it is a violation of " *good faith* for any man to take leſs care of an- " other's property, which has been intruſted to him, " *than of his own*; that, conſequently, the author " of the new ſyſtem demands no more of a " *partner* or a *joint-owner* than of a *depoſitary*, " who is bound to keep the goods depoſited *as* " *he keeps his own*; which is directly repugnant " to the indiſputable and undiſputed ſenſe of the " law *Contractus*."

I cannot learn whether M. LE BRUN ever publiſhed a reply, but am inclined to believe that his ſyſtem has gained very little ground in *France*, and that the old interpretation continues univerſally admitted on the continent both by theoriſts and practiſers.

Nothing material can be added to POTHIER'S argument, which, in my humble opinion, is unanſwerable; but it may not be wholly uſeleſs to

ſet down a few general remarks on the controverſy: particular obſervations might be multiplied without end.

The only *eſſential* difference between the ſyſtems of GODEFROI and LE BRUN relates to the *two* contracts, which follow the much-diſputed clauſe; for the *Swiſs* lawyer makes the partner and co-proprietor anſwerable for *ordinary* neglect, and the *French* advocate demands no more from them than *common honeſty:* now, in this reſpect, the error of the *ſecond* ſyſtem has been proved to demonſtration; and the author of it himſelf confeſſes ingenuouſly, that the other part of it fails in the article of *Marriage-portions**.

In regard to the diviſion of neglect and care into *three* degrees or *two*, the diſpute appears to be merely verbal; yet, even on this head, LE BRUN ſeems to be ſelf-confuted: he begins with engaging to prove "that only *two* degrees of "fault are diſtinguiſhed by the laws of *Rome*," and ends with drawing a concluſion, that they acknowledge but *one* degree: now, though this might be only a ſlip, yet the whole tenor of his book eſtabliſhes *two* modes of *diligence*, the *omiſſions* of which are *as many* neglects; excluſively of *groſs* neglect, which he likewiſe admits, for the *culpa leviſſima* only is that, which he repu-

* See p. 71. *note*; and p. 126.

diates. It is true, that he gives no epithet or name to the omiſſion of his *ſecond* mode of care; and, had he ſearched for an epithet, he could have found no other than *groſs*; which would have demonſtrated the weakneſs of his whole ſyſtem*.

The diſquiſition amounts, in fact, to this: from the barrenneſs or *poverty*, as LUCRETIUS calls it, of the *Latin* language, the ſingle word CULPA includes, as a generick term, various degrees or ſhades of *fault*, which are ſometimes diſtinguiſhed by epithets, and ſometimes left without any diſtinction; but the *Greek*, which is rich and flexible, has a term expreſſive of almoſt every ſhade, and the tranſlators of the law *Contractus* actually uſe the words ῥᾳθυμία and ἀμέλεια, which are by no means ſynonymous, the former implying a certain *eaſineſs of mind* or *remiſſneſs of attention*, while the ſecond imports a higher and more culpable degree of *negligence*†. This obſervation, indeed, ſeems to favour the ſyſtem of GODEFROI; but I lay no great

* See pages 32. 73. 74. 149.

† *Baſilica*, 2, 3, 23. See *Demoſth.* 3 Phil. *Reiſke's* edit. I. 112. 3. For *leviſſima culpa*, which occurs but once in the whole body of *Roman* law, ῥᾳθυμία ſeems the proper word in *Greek*; and it is actually ſo uſed in the *Baſilica*, 60. 3. 5. where mention is made of the *Aquilian* law, *in quâ*, ſays ULPIAN, *et leviſſima culpa venit.* D. 9. 2. 44.

ſtreſs on the mere words of the tranſlation, as I cannot perſuade myſelf, that the *Greek* juriſts under BASILIUS and LEO were perfectly acquainted with the niceties and genuine purity of their language; and there are invincible reaſons, as, I hope, it has been proved, for rejecting all ſyſtems but that, which POTHIER has recommended and illuſtrated.

I come now to the laws of our own country, in which the ſame diſtinctions and the ſame rules, notwithſtanding a few claſhing authorities, will be found to prevail; and here I might proceed chronologically from the oldeſt *Year-book* or *Treatiſe* to the lateſt adjudged *Caſe*; but, as there would be a moſt unpleaſing dryneſs in that method, I think it better to examine ſeparately every diſtinct *ſpecies* of bailment, obſerving at the ſame time, under each head, a kind of hiſtorical order. It muſt have occurred to the reader, that I might eaſily have taken a wider field, and have extended my inquiry to every poſſible caſe, in which a man *poſſeſſes for a time the goods of another*; but I choſe to confine myſelf within certain limits, leſt, by graſping at too vaſt a ſubject, I ſhould at laſt be compelled, as it frequently happens, by accident or want of leiſure, to leave the whole work unfiniſhed: it will be ſufficient to remark, that the rules are in general the ſame, by whatever means the goods *are legally* in the hands of

the poſſeſſor, whether by delivery from the owner, which is a proper *bailment*, or from any other perſon, by finding*, or in conſequence of ſome diſtinct contract.

Sir JOHN HOLT, whom every *Engliſhman* ſhould mention with reſpect, and from whom no *Engliſh* lawyer ſhould venture to diſſent without extreme diffidence, has taken a comprehenſive view of this whole ſubject in his judgment on a celebrated caſe, which ſhall ſoon be cited at length; but, highly as I venerate his deep learning and ſingular ſagacity, I ſhall find myſelf conſtrained, in ſome few inſtances, to differ from him, and ſhall be preſumptuous enough to offer a correction or two in part of the doctrine, which he propounds in the courſe of his argument†.

His diviſion of bailments into *ſix* ſorts appears, in the firſt place, a little inaccurate; for, in truth, his *fifth* ſort is no more than a branch of his *third*, and he might, with equal reaſon, have added a *ſeventh*, ſince the fifth is capable of another ſubdiviſion. I acknowledge, therefore, but *five* ſpecies of bailment; which I ſhall now enumerate and define, with all the

* Doct. and Stud. dial. 2. ch. 38. Lord Raym. 909. 917. See Ow. 141. 1 Leon. 224. 1 Cro. 219. *Mulgrave* and *Ogden*.

† Lord Raym. 912.

Latin names, one or two of which lord HOLT has omitted. 1. DEPOSITUM, which is a naked bailment, without reward, of goods to be *kept* for the bailor. 2. MANDATUM, or *commiſſion*; when the mandatary undertakes, without recompence, to *do ſome act* about the things bailed, or ſimply to *carry* them; and hence Sir HENRY FINCH divides bailment into *two* ſorts, to *keep*, and to *employ**. 3. COMMODATUM, or *loan for uſe*; when goods are bailed, without pay, to be *uſed* for a certain time by the bailee. 4. PIGNORI ACCEPTUM; when a thing is bailed by a debtor to his creditor in *pledge*, or as a ſecurity for the debt. 5. LOCATUM, or *hiring*, which is always for *a reward*; and this bailment is either, 1. *locatio rei*, by which the hirer gains the temporary uſe of *the thing*; or, 2. *locatio operis faciendi*, when *work* and *labour*, or *care* and *pains*, are to be performed or beſtowed on the thing delivered: or, 3. *locatio operis mercium vehendarum*, when goods are bailed for the purpoſe of being *carried* from place to place, either to a *publick* carrier, or to a *private* perſon.

I. The moſt ancient caſe, that I can find in our books, on the doctrine of DEPOSITS (there were others, indeed, a few years earlier, which turned on points of pleading), was adjudged in

* Law, b. 2. ch. 18.

would, therefore, be *groſs* negligence in a depoſitary to leave ſuch a depoſit in an open antichamber, and *ordinary* neglect, at leaſt, to let them remain on his table, where they might poſſibly tempt his ſervants; but no man can proportion his care to the *nature* of things, without knowing them: perhaps, therefore, it would be no more than *ſlight* neglect, to leave out of a drawer a box or caſket, which was neither known, nor could juſtly be ſuſpected, to contain diamonds; and DOMAT, who prefers the opinion of TREBATIUS, decides, "that, in ſuch a caſe, the de-"poſitary would only be obliged to reſtore the "caſket, as it was delivered, without being re-"ſponſible for the contents of it." I confeſs, however, that, anxiouſly as I wiſh on all occaſions to ſee authorities reſpected, and judgment holden ſacred, BONION'S caſe appears to me wholly incomprehenſible; for the defendant, inſtead of having been *groſsly* negligent (which alone could have expoſed him to an action), ſeems to have uſed at leaſt *ordinary* diligence; and, after all, the loſs was occaſioned by a *burglary*, for which no bailee can be reſponſible without a very ſpecial undertaking. The plea, therefore, in this caſe was good, and the replication, idle; nor could I ever help ſuſpecting a miſtake in the laſt words *alii quòd non*; although RICHARD DE WINCHEDON, or whoever was the

compiler of the *table* to this Year-book, makes a diſtinction, that, "if jewels be bailed to me, and "*I put them* into a caſket, and *thieves rob me of* "*them in the night-time*, I am anſwerable; not, "if they be *delivered* to me in a cheſt *ſealed* "*up*;" which could never have been law, for the next oldeſt caſe, in the book of *Aſſiſe*, contains the opinion of chief juſtice THORPE, that "a general bailee *to keep* is not reſponſible, "*if the goods be ſtolen*, without his *groſs* ne-"glect*;" and it appears, indeed, from FITZ-HERBERT, that the party was driven to this iſſue, "whether the goods were taken away by "*robbers*."

By the *Moſaick* inſtitutions, "if a man deli-"vered to his neighbour MONEY or STUFF *to* "*keep*, and it was *ſtolen* out of his houſe, and the "thief could not be found, the maſter of the "houſe was to be brought before the judge, and "to be diſcharged, if he could ſwear, that he "had not *put his hand* unto his neighbour's "goods†," or, as the *Roman* author of the LEX DEI tranſlates it, *Nihil ſe nequiter geſſiſſe* ‡; but a diſtinction ſeems to have been made between a

* 29. Aſſ. 28. Bro. Abr. *tit.* Bailment, pl. 7.

† Exod. xxii. 7, 8.

‡ Lib. 10. De Depoſito. This book is printed in the ſame volume with the *Theodoſian* Code, Paris, 1586.

ſtealing by *day* and a ſtealing by *night**; and "if CATTLE were bailed and ſtolen (by *day*, I "preſume), the perſon, who had the care of "them, was bound to make reſtitution to the "owner†;" for which the reaſon ſeems to be, that, when *cattle* are delivered *to be kept*, the bailee is rather a *mandatary* than a depoſitary, and is, conſequently, obliged to uſe a degree of diligence *adequate to the charge:* now ſheep can hardly be ſtolen in the *day-time* without ſome neglect of the ſhepherd; and we find that, when JACOB, who was, for a long time at leaſt, a bailee of a different ſort, *as he had a reward*, loſt any of the beaſts intruſted to his care, LABAN made him anſwer for them "whether ſtolen by "day or ſtolen by night‡."

Notwithſtanding the high antiquity, as well as the manifeſt good ſenſe, of the rule, a contrary doctrine was advanced by Sir EDWARD COKE, in his *Reports*, and afterwards deliberately inſerted in his *Commentary on* LITTLETON, the great reſult of all his experience and learning; namely, "that a depoſitary is reſponſible, if the "goods be ſtolen from him, unleſs he accept "them ſpecially *to keep as his own*," whence he adviſes all depoſitaries to make ſuch a ſpe-

* Gen. xxxi. 39. † Exod. xxii. 12.
‡ Gen. xxxi. 39.

cial acceptance*. This opinion, ſo repugnant to natural reaſon and the laws of all other nations, he grounded partly on ſome broken caſes in the Year-books, mere converſations on the bench, or looſe arguments at the bar; and partly on SOUTHCOTE's caſe, which he has reported, and which by no means warrants his deduction from it. As I humbly conceive that caſe to be law, though the doctrine of the learned reporter cannot in all points be maintained, I ſhall offer a few remarks on the pleadings in the cauſe, and the judgement given on them.

SOUTHCOTE declared in detinue, that he had delivered goods to BENNET, *to be by him* SAFELY *kept:* the defendant confeſſed SUCH delivery, but pleaded in bar, that a certain perſon STOLE them out of his poſſeſſion; the plaintiff replied, proteſting that he had not been robbed, that the perſon named in the plea was a SERVANT of the defendant, and demanded judgement; which, on a general demurrer to the replication, he obtained. "The reaſon of the judgement, ſays lord "COKE, was, becauſe the plaintiff had delivered "the goods to be SAFELY kept, and the defend-"ant had taken the charge of them upon him-"ſelf, by accepting them on SUCH a delivery." Had the reporter ſtopped here, I do not ſee

* 4 Rep. 83. b. 1 Inſt. 89. a. b.

what poſſible objection could have been made; but his exuberant erudition boiled over, and produced the frothy conceit, which has occaſioned ſo many reflections on the caſe itſelf; namely, "that *to* KEEP and *to keep* SAFELY are one and the ſame thing;" a notion which was denied to be law by the whole court in the time of chief juſtice HOLT*.

It is far from my intent to ſpeak in derogation of the great commentator on LITTLETON; ſince it may truly be aſſerted of him, as QUINTILIAN ſaid of CICERO, that *an admiration of his works is a ſure mark of ſome proficiency in the ſtudy of the law*; but it muſt be allowed, that his profuſe learning often ran wild, and that he has injured many a good caſe by the vanity of thinking to improve them.

The pleader, who drew the replication in SOUTHCOTE's caſe, muſt have entertained an idea, that the *blame* was *greater*, if a *ſervant* of the depoſitary ſtole the goods, than if a mere *ſtranger* had purloined them; ſince the defendant ought to have been more on his guard againſt a perſon, who had ſo many opportunities of ſtealing; and it was his own fault, if he gave thoſe opportunities to a man, of whoſe honeſty he was not morally certain: the court, we find,

* Lord Raym. 911. *margin.*

rejected this diſtinction, and alſo held the replication informal, but agreed, that no advantage could be taken on a *general* demurrer of ſuch informality, and gave judgement on the ſubſtantial badneſs of the plea*. If the plaintiff, inſtead of replying, had demurred to the plea in bar, he might have inſiſted in argument, with reaſon and law on his ſide, "that, although "a *general* bailee *to keep* be reſponſible for "GROSS neglect *only*, yet BENNET had, by a "*ſpecial* acceptance, made himſelf anſwerable "for ORDINARY neglect *at leaſt*; that it was "*ordinary* neglect, to let the goods be *ſtolen* out "of his poſſeſſion, and he had not averred, that "they were ſtolen *without his default*; that he "ought to have put them into a *ſafe* place, ac-"cording to his undertaking, and have kept "the key of it himſelf; that the *ſpecial* bailee "was reduced to the claſs of a *conductor operis*, "or a workman *for hire*; and that a tailor, to "whom his employer has delivered lace for a "ſuit of clothes, is bound, if the lace be *ſtolen*, "to reſtore the value of it†." This reaſoning

* 1 Cro. 815.

† "Alia eſt *furti* ratio; id enim *non caſui*, ſed *levi culpæ*, fermè aſcribitur." *Gothofr.* Comm. in L. *Contractus*, p. 145. See D. 17. 2. 52. 3. where ſays the annotator, "Adverſùs *latrones* parùm prodeſt cuſtodia; adverſùs *furem* prodeſſe poteſt, ſi quis advigilet." See alſo POTH. *Contrat de Louage*, n. 429. and *Contrat de Pret à uſage*, n. 53. So, by juſtice *Cot-*

would not have been juſt, if the bailee had pleaded, as in BONION's caſe, that he had been *robbed by violence*, for no degree of *care* can in general prevent an open robbery: *impetûs prædonum*, ſays ULPIAN, *à nullo præſtantur.*

Mr. Juſtice POWELL, ſpeaking of SOUTHCOTE's caſe, which he denies to be law, admits, that, "if a man *does* undertake *ſpecially* to keep "goods SAFELY, that is a warranty, and will "oblige the bailee to keep them ſafely againſt "perils, where *he has a remedy over*, but *not* "againſt thoſe where he has *no* remedy over*." One is unwilling to ſuppoſe, that this learned judge had not read lord COKE's report with attention; yet the caſe, which he puts, is preciſely that which he oppoſes, for BENNET *did* undertake "to keep the goods SAFELY;" and, with ſubmiſſion, *the degree of care demanded*, not *the remedy over*, is the true meaſure of the obligation; for the bailee might have his *appeal of robbery*, yet he is not bound to keep the goods againſt *robbers* without a moſt expreſs agreement†. This, I apprehend, is all that was meaned by St. GERMAN, when he ſays, "that,

teſmore, "Si jeo grante byens a un home a garder a mon oeps, "ſi les byens per *ſon meſgarde* ſont *embles*, il ſera charge a moy "de meſmes les byens, mez s'il ſoit *robbe* de meſmes les byens, "il eſt excuſable per le ley." 10 Hen. VI. 21.

* Ld. Raym. 912. † 2 Sho. pl. 166.

" if a man *have nothing* for keeping the goods " bailed, and promiſe, at the time of the delivery, " to reſtore them *ſafe at his peril*, he is not re- " ſponſible for *mere caſualties** ;" but the rule extracted from this paſſage, " that a *ſpecial* ac- " ceptance *to keep* SAFELY will not charge the " bailee againſt the acts of *wrongdoers*†," to which purport HOBART alſo and CROKE are cited, is too general, and muſt be confined to acts of *violence*.

I cannot leave this point, without remarking, that a *tenant at will*, whoſe intereſt, when he has it rentfree, the *Romans* called PRECARIUM, ſtands in a ſituation exactly parallel to that of a depoſitary; for, although the contract be for *his benefit*, and, in ſome inſtances, for *his* benefit *only*, yet he has an *intereſt* in the land till the will is determined, " and, our law adds, it is the folly of " the leſſor, if he do not reſtrain him by a ſpecial " condition:" thence it was adjudged, in the *Counteſs of Shrewſbury's* caſe, " that an action " will not lie againt a tenant at will *generally*, if " the houſe be burned through his neglect‡;" but, ſays juſtice POWELL, " had the action been " founded on a *ſpecial* undertaking, as that, in " conſideration that the leſſor would let him live

* Doct. and Stud. dial. 2. chap. 38.

† Com. 135. Ld. Raym. 915.

‡ 5 Rep. 13 b.

" in the houſe, he would deliver it up *in as good* " *repair as it then was in*, ſuch an action would " have been maintainable.*"

It being then eſtabliſhed, that a bailee of the *firſt* ſort is anſwerable only for a *fraud*, or for *groſs* neglect, which is conſidered as evidence of it, and not for ſuch *ordinary* inattentions as may be compatible with *good faith*, if the depoſitary be himſelf *a careleſs and inattentive* man; a queſtion may ariſe, whether, if proof be given, that he is, in truth, very *thoughtful and vigilant in his own concerns*, he is not bound to reſtitution, if the depoſit be loſt through his neglect, either *ordinary* or *ſlight*; and it ſeems eaſy to ſupport the affirmative; ſince in this caſe the meaſure of diligence is *that, which the bailee uſes in his own affairs*. It muſt however be confeſſed, that the character of the individual depoſitary can hardly be an object of judicial diſcuſſion: if he be *ſlightly* or even *ordinarily* negligent in keeping the goods depoſited, the favourable preſumption is, that he is equally neglectful of his own property; but this preſumption, like all others, may be repelled; and, if it be proved, for inſtance, that, his houſe being on fire, he ſaved his own goods, and, having time and power to ſave alſo thoſe depoſited, ſuffered them to be burned, he

* Ld. Raym. 911.

ſhall reſtore the worth of them to the owner*. If, indeed, he have time to ſave only one of two cheſts, and one be a depoſit, the other his own property, he may juſtly prefer his own; unleſs that contain things of ſmall comparative value, and the other be full of much more precious goods, as fine linen or ſilks; in which caſe he ought to ſave the more valuable cheſt, and has a right to claim indemnification from the depoſitor for the loſs of his own. Still farther; if he commit even a *groſs* neglect in regard to his own goods *as well as* thoſe bailed, by which *both* are loſt or damaged, *he cannot be ſaid to have violated good faith*, and the bailor muſt impute to his own folly the confidence which he repoſed in ſo improvident and thoughtleſs a perſon†.

To this principle, that a depoſitary is anſwerable *only* for *groſs* negligence, there are ſome exceptions.

Firſt, as in SOUTHCOTE's caſe, where the bailee, by a *ſpecial* agreement, has engaged to anſwer for leſs: "Si quid nominatim convenit," ſays the *Roman* lawyer, "vel plus vel minus in ſingulis "contractibus, hoc ſervabitur quod initiò con-"venit; legem enim contractui dedit‡;" but the

* POTH. *Contrat de Dépôt*, n. 29. Stiernh. *de Jure Sueon.* l. 2. c. 5.

† Bract. 99. b. Juſtin. Inſt. l. 3. tit. 15.

‡ L. *Contractus*, 23. D. *de reg. jur.*

opinion of CELSUS, that an agreement *to diſpenſe with deceit* is void, as being contrary to good morals and decency, has the aſſent both of ULPIAN and our *Engliſh* courts*.

Secondly; when a man ſpontaneouſly and officiouſly propoſes to keep the goods of another, *he may prevent the owner from intruſting them with a perſon of more approved vigilance*; for which reaſon *he takes upon himſelf*, according to JULIAN, *the riſk of the depoſit, and becomes reſponſible at leaſt for ordinary neglect, but not for mere caſualties*†.

Where things are depoſited through neceſſity on any ſudden emergence, as a fire or a ſhipwreck, M. LE BRUN inſiſts, "that the depoſitary muſt "anſwer for *leſs than groſs* neglect, how careleſs "ſoever he may be in his own affairs; ſince the "preceding remark, that *a man, who repoſes con-* "*fidence in an improvident perſon, muſt impute* "*any loſs to his own folly*, is inapplicable to a "caſe, where the depoſit was not optional; and "*the law ceaſes with the reaſon of it*‡;" but that is not the *only* reaſon; and, though it is an additional misfortune, for a man in extreme haſte and deep diſtreſs to light upon a ſtupid or inat-

* Doct. and Stud. dial. 2. chap. 38.

† D. 16. 3. 1. 35.

‡ *De la Preſtation des Fautes*, p. 77.

tentive depoſitary, yet I can hardly perſuade myſelf, that more than perfect *good faith* is demanded in this caſe, although a violation of that faith be certainly more criminal than in other caſes, and was therefore puniſhed at *Rome* by a forfeiture of the double value of the goods depoſited.

In theſe circumſtances, however, a benevolent *offer* of keeping another's property for a time would not, I think, bring the caſe within JULIAN's rule before-mentioned, ſo as to make the perſon offering anſwerable for *ſlight*, or even *ordinary*, negligence; and my opinion is confirmed by the authority of LABEO, who requires no more than *good faith* of a *negotiorum geſtor*, when "affectione coactus, ne bona mea diſtrahantur, "negotiis ſe meis obtulerit."

Thirdly; when the bailee, improperly called a *depoſitary*, either *directly* demands and receives a reward *for his care*, or takes the charge of goods *in conſequence of* ſome *lucrative* contract, he becomes anſwerable for *ordinary* neglect; ſince, in truth, he is in both caſes a *conductor operis*, and *lets out* his mental labour at a juſt price: thus, when clothes are left with a man, who is paid for the uſe of his bath, or a trunk with an innkeeper or his ſervants, or with a ferryman, the bailees are as much bound to indemnify the owners if the goods be loſt or damaged through

their want of *ordinary* circumſpection, as if they were to receive a ſtipulated recompenſe *for their attention and pains*; but of this more fully, when we come to the article of *hiring*.

Fourthly; when the *bailee alone* receives advantage from the depoſit, as, if a thing be borrowed on a future event, and depoſited with the intended borrower, until the event happens, becauſe the owner, perhaps, is likely to be abſent at the time, ſuch a depoſitary muſt anſwer even for *ſlight* negligence; and this bailment, indeed, is rather a *loan* than a depoſit, in whatever light it may be conſidered by the parties. Suppoſe, for example, that *Charles*, intending to appear at a maſked ball expected to be given on a future night, requeſts *George* to lend him a dreſs and jewels for that purpoſe, and that *George*, being obliged to go immediately into the country, deſires *Charles* to keep the dreſs till his return, and, if the ball be given in the mean time, to wear it; this ſeems to be a regular *loan*, although the original purpoſe of borrowing be future and contingent.

Since, therefore, the two laſt caſes are not, in ſtrict propriety, *depoſits*, the exceptions to the general rule are reduced to two only; and the ſecond of them, I conceive, will not be rejected by the *Engliſh* lawyer, although I recollect no de-

ciſion or dictum exactly conformable to the opinion of JULIAN.

Clearly as the obligation to *reſtore* a depoſit flows from the nature and definition of this contract, yet, in the reign of ELIZABETH, when it had been adjudged, conſiſtently with common ſenſe and common honeſty, "that an action on "the caſe lay againſt a man, who had not per-"formed his promiſe of redelivering, or deliver-"ing over, things bailed to him," that judgement was *reverſed*; and, in the ſixth year of JAMES, judgement for the plaintiff was arreſted in a caſe exactly ſimilar*: it is no wonder, that the profeſſion *grumbled*, as lord HOLT ſays, at ſo abſurd a reverſal; which was itſelf moſt juſtly reverſed a few years after, and the firſt deciſion ſolemnly eſtabliſhed†.

Among the other curious remains of *Attick* law, which philologers have collected, very little relates to the contracts, which are the ſubject of this eſſay; but I remember to have read of DEMOSTHENES, that he was advocate for a perſon, with whom *three* men had depoſited ſome valuable uteſil, of which they were joint-owners; and the depoſitary had delivered it to *one* of them, of whoſe knavery he had no ſuſpicion;

* Yelv. 4. 50. 128.

† 2Cro. 667. *Wheatly* and *Low*.

upon which the other *two* brought an action, but were nonſuited on their own evidence, that there was a *third* bailor, whom they had not joined in the ſuit; for, the truth not being proved, DEMOSTHENES inſiſted, *that his client could not legally reſtore the depoſit, unleſs all three proprietors were ready to receive it*; and this doctrine was good at *Rome* as well as at *Athens*, when the thing depoſited was in its nature incapable of partition: it is alſo law, I apprehend, in Weſtminſter-hall*.

The obligation to return a depoſit faithfully was, in very early times, holden ſacred by the *Greeks*, as we learn from the ſtory of GLAUCUS, who, on conſulting the oracle, received this anſwer "that it was criminal even *to harbour a* "*thought* of with-holding depoſited goods from "the owners, who claimed them†;" and a fine application of this *univerſal* law is made by an *Arabian* poet contemporary with JUSTINIAN, who remarks, "that life and wealth are only "*depoſited* with us by our creator, and, *like all* "*other depoſits*, muſt in due time be reſtored."

II. Employment by COMMISSION was alſo known to our ancient lawyers; and BRACTON, the beſt writer of them all, expreſſes it by the *Roman*

* D. 16. 3. 1. 36. Bro. Abr. *tit.* Bailment, pl. 4.

† Herod. VI. 86. Juv. *Sat.* XIII. 199.

word, *Mandatum*; now, as the very eſſence of this contract is the *gratuitous* performance of it by the bailee, and as the term *commiſſion* is alſo pretty generally applied to bailees, who receive *hire* or *compenſation* for their attention and trouble, I ſhall not ſcruple to adopt the word MANDATE as appropriated *in a limited ſenſe* to the ſpecies of bailment now before us; nor will any confuſion ariſe from the common acceptation of the word in the ſenſe of a judicial command or precept, which is in truth only a *ſecondary* and inaccurate uſage of it. The great diſtinction then between one ſort of *mandate* and a *depoſit* is, that the former *lies in feſance*, and the latter, ſimply *in cuſtody:* whence, as we have already intimated, a difference often ariſes between the degrees of care demanded in the one contract and in the other; for, the mandatary being conſidered as having engaged himſelf, to uſe *a degree of diligence and attention adequate to the performance of his undertaking*, the omiſſion of ſuch diligence may be, according to the nature of the buſineſs, either *ordinary*, or *ſlight*, neglect; although a bailee of this ſpecies ought regularly to be anſwerable only for a violation of *good faith*. This is the common doctrine taken from the law of ULPIAN; but there ſeems, in reality, to be no exception in the preſent caſe from the general rule; for, ſince *good faith* itſelf

obliges every man *to perform his actual engagements*, it of courſe obliges the mandatary to exert himſelf in proportion to the exigence of the affair in hand, and neither to *do* any thing, how minute ſoever, by which his employer may ſuſtain damage, nor *omit* any thing, however inconſiderable, which the nature of the act requires*: nor will a want of ability to perform the contract be any defence for the contracting party; for, though the law *exacts no impoſſible things*, yet it may juſtly require, that every man ſhall know his own ſtrength, before he undertakes to do an act, and that, if he delude another by falſe pretenſions to ſkill, he ſhall be reſponſible for any injury, that may be occaſioned by ſuch deluſion. If, indeed, an unſkilful man yield to the preſſing inſtances of his friend, who could not otherwiſe have his work performed, and engage reluctantly in the buſineſs, no higher degree of diligence can be demanded of him than a fair exertion of his capacity.

It is almoſt needleſs to add, that a mandatary, as well as a depoſitary, may bind himſelf by a *ſpecial* agreement to be anſwerable even for caſualties; but that neither the one nor the other can exempt himſelf by any ſtipulation from reſponſibility for *fraud*, or, its equivalent, *groſs* neglect.

* Lord Raym. 910.

A diſtinction ſeems very early to have been made in our law between the *non*feſance, and the *miſ*feſance, of a *conductor operis*, and, by equal reaſon, of a mandatary; or, in other words, between a total failure of performing an executory undertaking and a culpable neglect in executing it; for, when an action on the caſe was brought againſt a carpenter, who, having undertaken to build a new houſe for the plaintiff within a certain time, *had not built it*, the court gave judgment of nonſuit; but agreed, that, if the defendant had built the houſe negligently and ſpoiled the timber, an action againſt him would have been maintainable*. However, in a ſubſequent reign, when a ſimilar action was commenced againſt one WATKINS for *not building* a mill according to his undertaking, there was a long converſation between the judges and the bar, which chief juſtice BABINGTON at length interrupted by ordering the defendant's counſel either to plead or to demur; but ſerjeant ROLF choſe to plead ſpecially, and iſſue was taken on a *diſcharge* of the agreement.† Juſtice MARTIN objected to the action, becauſe no tort was alledged; and he perſiſted warmly in his opinion,

* Yearb. 11. Hen. IV. 33.

† Yearb. 3. Hen. VI. 36. b. 37. a. *Stath.* Abr. tit. *Accions ſur le cas*, pl. 20.

which ſeems not wholly irreconcilable to that of his two brethren; for in the caſes, which they put, a ſpecial injury *was* ſuppoſed to be occaſioned by the non-performance of the contract.

Authority and reaſon both convince me, that MARTIN, into whoſe opinion the reporter recommends an inquiry, was wrong in his objection, if he meaned, as juſtice COKAIN and the chief juſtice ſeem to have underſtood him, that no ſuch action would lie for *non*feſance, even *though ſpecial damage had been ſtated*. His argument was, that the action before them *ſounded in covenant* merely, and required a ſpecialty to ſupport it; but that, if the covenant had been changed into a *tort*, a good writ of treſpaſs on the caſe might have been maintained: he gave, indeed, an example of *miſ*feſance, but did not controvert the inſtances, which were given by the other judges.

It was not alledged in either of the caſes juſt cited, that the defendant was to receive *pay* for the feſance of his work; but, ſince both defendants were deſcribed as *actually in trade*, it was not perhaps intended, that they were to work *for nothing*: I cannot however perſuade myſelf, that there would have been any difference, had the promiſes been purely *gratuitous*, and had a ſpecial injury been cauſed by the breach of them. Suppoſe, for inſtance, that *Robert's* corn-fields are ſur-

rounded by a ditch or trench, in which the water from a certain ſpring uſed to have a free courſe, but which has of late been obſtructed by ſoil and rubbiſh; and that, *Robert* informing his neighbour *Henry* of his intention ſpeedily to clear the ditch, *Henry* offers and undertakes immediately to remove the obſtruction and repair the banks *without reward*, he having buſineſs of the ſame kind to perform on his own grounds: if, in this caſe, *Henry* neglect to do the work undertaken, "and the water, not having its natural courſe, overflow the fields of *Robert* and "ſpoil his corn," may not *Robert* maintain his action on the caſe? Moſt aſſuredly; and ſo in a thouſand inſtances of proper bailments, that might be ſuppoſed; where a juſt reliance on the promiſe of the defendant prevented the plaintiff from employing another perſon, and was conſequently the cauſe of the loſs, which he ſuſtained*; for it is, as it ought to be, a general rule, that, for every *dammum injuriâ datum*, an action of ſome ſort, which it is the province of the pleader to adviſe, may be maintained; and, although the *gratuitous* performance of an act be a *benefit* conferred, yet, according to the juſt maxim of PAULUS, *Adjuvari nos, non decipi, beneficio oportet*†: but the *ſpecial* da-

* Yearb. 19. Hen. VI. 49.

† D. 13. 6. 17. 3.

mage, not the aſſumption, is the cauſe of *this* action; and, if *notice* be given by the mandatary, *before any damage incurred, and while another perſon may be employed*, that he cannot perform the work, no proceſs of law can enforce the performance of it.

A caſe in BROOK, made complete from the Year-book, to which he refers, *ſeems* directly in point; for, by chief juſtice FINEUX, *it had been adjudged*, that, "if a man aſſume to build a "houſe for me by a certain day, and do not "build it, *and I ſuffer damage by his nonfeſance*, "I ſhall have an action on the caſe, as well as if "he had *done it amiſs:*" but it is *poſſible*, that FINEUX might ſuppoſe a conſideration, though none be mentioned*.

Actions on this contract are, indeed, very uncommon, for a reaſon not extremely flattering to human nature; becauſe it is very uncommon to undertake any office of trouble *without compenſation*; but, whether the caſe really happened, or the reward, which has actually been ſtipulated, was omitted in the declaration, the queſtion, "whether a man was reſponſible for damage to "certain goods occaſioned by his negligence in "performing a GRATUITOUS promiſe," came before the court, in which lord HOLT preſided, ſo lately as the ſecond year of queen ANNE; and

* Bro. Abr. *tit.* Action ſur le Caſe, 72.

a point, which the firſt elements of the *Roman* law have ſo fully decided, that no court of judicature on the continent would ſuffer it to be debated, was thought in ENGLAND *to deſerve*, what it certainly received, *very great conſideration**.

The caſe was this: BERNARD had aſſumed *without pay* ſafely to remove ſeveral caſks of brandy from one cellar, and lay them down *ſafely* in another, but managed them ſo negligently, that one of the caſks was ſtaved. After the general iſſue joined, and a verdict for the plaintiff COGGS, a motion was made in arreſt of judgement on the irrelevancy of the declaration, in which it was neither alledged, that the defendant was to have *any recompenſe for his pains*, nor that he was a *common porter:* but the court were unanimouſly of opinion, that the action lay; and, as it was thought a matter of great conſequence, each of the judges delivered his opinion ſeparately.

The chief juſtice, as it has before been intimated†, pronounced a clear, methodical, elaborate argument; in which he diſtinguiſhed bailments into *ſix* ſorts, and gave a hiſtory of the principal authorities concerning each of them.

* Ld. Raym. 909—920. 1 Salk. 26. Com. 133. Farr. 13. 131. 528.

† P. 301.

This argument is juſtly repreſented by my learned friend, the annotator *on the Firſt Inſtitute*, as "a moſt maſterly view of the whole ſubject of "bailment*;" and, if my little work be conſidered merely as a commentary on it, the ſtudent may perhaps think, that my time and attention have not been unuſefully beſtowed.

For the deciſion of the principal caſe, it would have been ſufficient, I imagine, to inſiſt, that the point was *not new*, but had already been determined; that the writ in the REGISTER, called, in the ſtrange dialect of our forefathers, *De pipâ vini cariandâ*†, was not ſimilar, but identical; for, had the reward been the *eſſence* of the action, it muſt have been inſerted in the writ, and nothing would have been left for the declaration but the ſtating of the day, the year, and other circumſtances; of which RASTELL exhibits a complete example in a writ and declaration for *negligently and improvidently planting a quickſet hedge*, which the defendant had promiſed to raiſe, *without any conſideration alledged*; and iſſue was joined on a traverſe of the negligence

* Hargr. Co. Litt. 89. b. n. 3. The profeſſion muſt lament the neceſſary ſuſpenſion of this valuable work.

† Reg. Orig. 110. a. ſee alſo 110. b. *De equo infirmo ſanando*, and *De columbari reparando*.

and improvidence*. How any anſwer could have been given to theſe authorities, I am at a loſs even to conceive: but, although it is needleſs to prove the ſame thing twice, yet other authorities, equally unanſwerable, were adduced by the court, and ſupported with reaſons no leſs cogent; for *nothing*, ſaid Mr. Juſtice POWELL emphatically, *is law, that is not reaſon*; a maxim, in theory excellent, but in practice dangerous, as many rules, true in the abſtract, are falſe in the concrete; for, ſince the reaſon of TITIUS may, and frequently does, differ from the reaſon of SEPTIMIUS, no man, who is not a lawyer, would ever know how to act, and no man, who is a lawyer, would in many inſtances know what to adviſe, unleſs courts were bound by *authority*, as firmly as the pagan deities were ſuppoſed to be bound by the decrees of fate.

Now the *reaſon* aſſigned by the learned judge for the caſes in the *Regiſter* and *Year-books*, which were the ſame with COGGS and BERNARD, namely, "that the party's SPECIAL *aſ-*"*ſumpſit* and undertaking obliged him *ſo* to do "the thing, that the bailor came to no damage by his neglect," ſeems to intimate, that the omiſſion of the words *ſalvò et ſecure* would have made a difference in this caſe, as in that of a *depoſit*; but I humbly contend, that thoſe words are implied,

* Raſt. Entr. 13. b.

by the nature of a contract which lies *in feſance*, agreeably to the diſtinction with which I began this article. As judgement, indeed, was to be given on the record merely, it was unneceſſary, and might have been improper, to have extended the propoſition beyond the point then before the court; but I cannot think, that the narrowneſs of the propoſition in this inſtance affects the general doctrine, which I have preſumed to lay down; and, in the ſtrong caſe of the ſhepherd, *who had a flock to keep*, which he *ſuffered through negligence to be drowned*, neither a *reward* nor a *ſpecial* undertaking are ſtated*: that caſe, in the opinion of juſtice TOWNSEND, depended upon the diſtinction between a bargain *executed* and *executory*; but I cannot doubt the relevancy of an action in the ſecond caſe, as well as the firſt, *whenever actual damage is occaſioned by the non-feſance*†.

There ſeems little neceſſity after this, to mention the caſe of POWTUARY and WALTON, the *reaſon* of which applies directly to the preſent ſubject; and, though it may be objected that the defendant was ſtated as a *farrier*, and muſt be

* Yearb. 2 Hen. VII. 11.

† *Stath. Abr.* tit. *Accions ſur le cas*, pl. 11. By juſtice *Paſton*, "ſi un ferrour face covenant ove moy de ferrer mon chival, "jeo die qe ſil *ne ferra* mon chival, uncore jeo averai accion "ſur mon cas, qar en ſon default paraventure mon chival eſt "perie."

preſumed to have acted *in his trade*, yet chief juſtice ROLLE intimates no ſuch preſumption; but ſays expreſsly, that "an action on the caſe "lies upon this matter, *without alledging any con-* "*ſideration:* for the *negligence* is the cauſe of "action, and not the *aſſumpſit**."

A bailment without reward to *carry* from place to place is very different from a mandate to *perform a work*; and, there being nothing to take it out of the general rule, I cannot conceive that the bailee is reſponſible for *leſs* than *groſs* neglect, unleſs there be a *ſpecial* acceptance: for inſtance, if *Stephen* deſire *Philip* to carry a diamond-ring from *Briſtol* to a perſon in *London*, and he put it *with bank-notes of his own* into a letter-caſe, out of which it is *ſtolen* at an inn, or ſeized by a robber on the road, *Philip* ſhall not be anſwerable for it; although a *very careful*, or perhaps a *commonly prudent*, man would have kept it in his purſe at the inn, and have concealed it ſomewhere in the carriage; but, if he were to ſecrete *his own notes* with peculiar vigilance, and either leave the diamond in an open room, or wear it on his finger in the chaiſe, I think he would be bound, in caſe of a loſs by ſtealth or robbery, to reſtore the value of it to *Stephen:* every thing, therefore, that has been expounded

* 1 Ro. Abr. 10.

in the preceding article concerning *depoſits*, may be applied exactly to *this ſort* of bailment, which may be conſidered as a ſubdiviſion of the ſecond ſpecies.

Since we have nothing in theſe caſes analogous to the judgements of *infamy*, which were often pronounced at *Rome* and *Athens*, it is hardly neceſſary to add, what appears from the ſpeech of CICERO for S. ROSCIUS of *Ameria*, that "the "ancient *Romans* conſidered a mandatary as *in-* "*famous*, if he broke his engagement, not only "by actual *fraud*, but even by *more than ordi-* "*nary negligence**."

As to *exceptions* from the rule concerning the degree of neglect, for which a mandatary is reſponſible, almoſt all, that has been advanced before in the article of *depoſits*, in regard to a ſpecial convention, a voluntary offer, and an intereſt accruing to both parties, or only to the bailee, may be applied to mandates: an undertaker of a work for the benefit of an abſent perſon, and *without his knowledge*, is the *negotiorum geſtor* of the civilians, and the obligation reſulting from

* "In privatis rebus, ſi quis rem *mandatam* non modo *ma-* "*litioſiùs* geſſiſſet, ſui quæſtûs aut commodi cauſâ, verùm etiam "*neoligentiùs*, eum majores ſummum admiſiſſe dedecus exiſti- "mabant: itaque *mandati* conſtitutum eſt judicium, non minùs "turpe quàm *furti*." Pro S. Roſc. p. 116. *Glaſg.*

his implied contract has been incidentally mentioned in a preceding page.

III. On the third ſpecies of bailment, which is one of the moſt uſual and moſt convenient in civil ſociety, little remains to be obſerved; becauſe our own, and the Roman, law are on this head perfectly coincident. I call it, after the *French* lawyers, *loan for uſe*, to diſtinguiſh it from their *loan for conſumption*, or the MUTUUM of the *Romans*; by which is underſtood the lending of *money*, *wine*, *corn*, and other things, that may be valued by number, weight, or meaſure, and are to be reſtored only in equal value or quantity*: this latter contract, which, according to St. GERMAN, is moſt properly called a *loan*, does not belong to the preſent ſubject; but it may be right to remark, that, as the *ſpecifick* things are not to be returned, the *abſolute* pro-

* Doct. and Stud. dial. 2. ch. 38. Bract. 99. a. b. In Ld. Raym. 916. where this paſſage from *Bracton* is cited by the chief juſtice, *mutuam* is printed for *commodatam*; but what then can be made of the words *ad* IPSAM *reſtituendam*? There is certainly ſome miſtake in the paſſage, which muſt be very ancient, for the oldeſt MS. that I have ſeen, is conformable to *Tottel's* edition. I ſuſpect the omiſſion of a whole line after the word *precium*, where the manuſcript has a full point; and poſſibly the ſentence omitted may be thus ſupplied from *Juſtinian*, whom *Bracton* copied: "At is, qui *mutuum* accepit, "obligatus remanet," ſi forte incendio, &c. *Inſt.* 3. 13. 2.

perty of them is transferred to the borrower, who muſt bear the loſs of them, if they be deſtroyed by wreck, pillage, fire, or other inevitable misfortune. Very different is the nature of the bailment in queſtion; for a horſe, a chariot, a book, a greyhound, or a fowling-piece, which are lent for the uſe of the bailee, ought to be redelivered *ſpecifically*; and the owner muſt abide the loſs, if they periſh through any accident, which a *very careful and vigilant man* could not have avoided. The negligence of the borrower, who alone receives benefit from the contract, is conſtrued rigorouſly, and, although *ſlight*, makes him liable to indemnify the lender; nor will his incapacity to exert *more than ordinary* attention avail him on the ground of an *impoſſibility*, "which the law, ſays the rule, never demands;" for that maxim relates merely to things *abſolutely* impoſſible; and it was not only very *poſſible*, but very *expedient*, for him to have examined his own capacity of performing the undertaking, before he deluded his neighbour by engaging in it: if the lender, indeed, was not deceived, but perfectly knew the *quality*, as well as age, of the borrower, he muſt be ſuppoſed to have demanded no higher care, than that of which *ſuch* a perſon was capable; as, if *Paul* lend a fine horſe to a raw youth, he cannot exact the ſame degree of management and cir-

cumſpection, which he would expect from a riding-maſter or an officer of dragoons*.

From the rule, that a borrower is anſwerable for *ſlight* neglect, compared with the diſtinction before made between ſimple *theft* and *robbery*†, it follows, that, if the borrowed goods be *ſtolen* out of his poſſeſſion by any perſon whatever, he muſt pay the worth of them to the lender, unleſs he prove, that they were purloined notwithſtanding his *extraordinary* care. The example, given by JULIAN, is the firſt and beſt that occurs: *Caius* borrows a ſilver ewer of *Titius*, and afterwards delivers it, that it may be ſafely reſtored, to a bearer of ſuch approved fidelity and warineſs, that no event could be leſs expected than its being ſtolen; if, after all, the bearer be met in the way by ſcoundrels, who contrive to *ſteal* it, *Caius* appears to be wholly blameleſs, and *Titius* has ſuffered *damnum ſine injuriâ*. It ſeems hardly neceſſary to add, that the ſame care, which the bailee is bound to take of the *principal* thing bailed, muſt be extended to ſuch *acceſſory* things, as belong to it, and were delivered with it: thus a man, who borrows a watch, is reſponſible for *ſlight* neglect of the chain and ſeals.

Although the laws of *Rome*, with which thoſe

* *Dumoulin*, tract. *De eo quod intereſt*, n. 185.

† See p. 370. and note†.

of *England* in this reſpect agree, moſt expreſsly decide, that a borrower, uſing more than ordinary diligence, *ſhall not be chargeable, if there be a force which he cannot reſiſt**, yet PUFENDORF employs much idle reaſoning, which I am not idle enough to tranſcribe, in ſupport of a new opinion; namely, "that the borrower ought to "indemnify the lender, if the goods lent be de-"ſtroyed by fire, ſhipwreck, or other inevitable "accident, and *without his fault*, unleſs *his own* "periſh with them:" for example, if *Paul* lend *William* a horſe worth thirty guineas to ride from *Oxford* to *London*, and *William* be attacked on a heath in that road by highwaymen, who kill or ſeize the horſe, he is obliged, according to PUFENDORF and his annotator, to pay thirty guineas to *Paul*. The juſtice and good ſenſe of the contrary deciſion are evinced beyond a doubt by M. POTHIER, who makes a diſtinction between thoſe caſes, where the loan was the *occaſion* merely of damage to the lender, who might in the mean time have ſuſtained a loſs from other accidents, and thoſe, where the loan was the ſole efficient *cauſe* of his damage†; as if *Paul*, having *lent* his horſe, ſhould be forced in the interval by ſome preſſing buſineſs to *hire* an-

* D. 44. 7. 1. 4. Ld. Raym. 916.

† Poth. *Prêt à Uſage*, n. 55. *Puf.* with *Barbeyrac's* notes, B. 5. C. 4. § 6.

other for himſelf; in this caſe the borrower ought, indeed, to pay for the hired horſe, unleſs the lender had voluntarily ſubmitted to bear the inconvenience *cauſed* by the loan; for, in this ſenſe and in this inſtance, *a benefit conferred ſhould not be injurious to the benefactor*. As to a condition *preſumed* to be impoſed by the lender, that he would not abide by any loſs *occaſioned* by the lending, it ſeems the wildeſt and moſt unreaſonable of preſumptions: if *Paul* really intended to impoſe ſuch a condition, he ſhould have declared his mind; and I perſuade myſelf, that *William* would have declined a favour ſo hardly obtained.

Had the borrower, indeed, been imprudent enough to leave the high road and paſs through ſome thicket, where robbers might be ſuppoſed to lurk, or had he travelled in the dark at a very unſeaſonable hour, and had the horſe, in either caſe, been taken from him or killed, he muſt have indemnified the owner; for *irreſiſtible force* is no excuſe, if a man put himſelf in the way of it by his own raſhneſs. This is nearly the caſe, cited by *St. German* from the *Summa Roſella*, where a *loan* muſt be meaned, though the word *depoſitum* be erroneouſly uſed*; and it is there decided, that, if the borrower of a horſe will im-

* *Doct.* and *Stud.* where before cited.

prudently ride by *a ruinous houſe in manifeſt danger of falling*, and part of it actually fall on the horſe's head, and kill him, the lender is entitled to the price of him; but that, if the houſe were *in good condition* and *fell* by the violence of a ſudden hurricane, the bailee ſhall be diſcharged. For the ſame, or a ſtronger, reaſon, if *William*, inſtead of coming to *London*, for which purpoſe the horſe was lent, go towards *Bath*, or, having borrowed him for a week, keep him for a month, he becomes reſponſible for any *accident*, that may befall the horſe in his journey to *Bath*, or after the expiration of the week*.

Thus, if *Charles*, in a caſe before put†, wear the maſked habit and jewels of *George* at the ball, for which they were borrowed, and be *robbed* of them in his return-home at the uſual time and by the uſual way, he cannot be compelled to pay *George* the value of them; but it would be otherwiſe, if he were to go with the jewels from the theatre to a gaming-houſe, and were there to loſe them by any caſualty whatever. So, in the inſtance propoſed by GAIUS in the digeſt, if ſilver utenſils be lent to a man for the purpoſe of entertaining a party of friends at ſupper *in the metropolis*, and he carry them *into the country*, there can be no doubt of his ob-

* Ld. Raym. 915. † P. 377.

ligation to indemnify the lender, if the plate be loſt by accident however irreſiſtible.

There are other caſes, in which a borrower is chargeable for *inevitable miſchance*, even when he has not, as he legally may, taken the whole riſk upon himſelf by expreſs agreement. For example, if the houſe of *Caius* be in flames, and he, being able to ſecure one thing only, ſave an urn of his own in preference to the ſilver ewer, which he had borrowed of *Titius*, he ſhall make the lender a compenſation for the loſs; eſpecially if the ewer be the more valuable, and would conſequently have been preferred, had he been owner of them both: even if his urn be the more precious, he muſt either leave it, and bring away the borrowed veſſel, or pay *Titius* the value of that, which he has loſt; unleſs the alarm was ſo ſudden, and the fire ſo violent, that no deliberation or ſelection could be juſtly expected, and *Caius* had time only to ſnatch up the firſt utenſil, that preſented itſelf.

Since openneſs and honeſty are the ſoul of contracts, and ſince "a ſuppreſſion of truth is often "as culpable as an expreſs falſehood," I accede to the opinion of M. POTHIER, that, if a ſoldier were to borrow a horſe of his friend for a battle expected to be fought the next morning, and were *to conceal from him, that his own horſe was as fit for the ſervice*, and if the horſe, ſo bor-

rowed, were ſlain in the engagement, the lender ought to be imdemnified; for probably the diſſimulation of the borrower induced him to lend the horſe; but, had the ſoldier openly and frankly acknowledged, *that he was unwilling to expoſe his own horſe*, ſince, in caſe of a loſs, he was unable to purchaſe another, and his friend, nevertheleſs, had generouſly lent him one, the lender would have run, as in other inſtances, the riſk of the day.

If the bailee, to uſe the *Roman* expreſſion, be IN MORA, that is, if *a legal demand* have been made by the bailor, he muſt anſwer for any caſualty that happens *after the demand*; unleſs in caſes, where it may be ſtrongly preſumed, that the ſame accident would have befallen the thing bailed, even if it had been reſtored at the proper time; or unleſs the bailee have legally tendered the thing, and the bailor have put himſelf *in morâ* by refuſing to accept it: this rule extends of courſe to every ſpecies of bailment.

"Whether, in caſe of a *valued loan*, or, where "the goods lent are *eſtimated at a certain price*, "the borrower muſt be conſidered as bound *in* "*all events* to reſtore either the things lent or "the value of them," is a queſtion, upon which the civilians are as much divided, as they are upon the celebrated clauſe in the law *Contractus*: five or ſix commentators of high reputation enter

the liſts againſt as many of equal fame, and each ſide diſplays great ingenuity and addreſs in this juridical tournament. D'AVEZAN ſupports the affirmative; and POTHIER, the negative; but the ſecond opinion ſeems the more reaſonable. The word PERICULUM, uſed by ULPIAN, is in itſelf equivocal: it means *hazard* in general, proceeding either from *accident* or from *neglect*; and in this latter ſenſe it appears to have been taken by the *Roman* lawyer in the paſſage, which gave birth to the diſpute. But, whatever be the true interpretation of that paſſage, I cannot ſatisfy myſelf, that, either in the *Cuſtomary Provinces* of FRANCE, or in ENGLAND, a borrower can be chargeable for all events *without his conſent unequivocally given:* if *William*, indeed, had ſaid to *Paul* alternatively, "I promiſe, on my return to "*Oxford, either* to reſtore your horſe *or* to pay "you thirty guineas," he muſt *in all events* have performed one part of this disjunctive obligation*; but, if *Paul* had only ſaid, "the horſe, "which I lend you for this journey, is fairly "worth thirty guineas," no more could be implied from thoſe words, than a deſign of preventing any future difficulty about the price, if the horſe ſhould be killed or injured through an omiſſion of that *extraordinary* diligence, which the nature of the contract required.

* Palm. 651.

Beſides the *general* exception to the rule concerning the degrees of neglect, namely, *Si quid convenit vel plus vel minus*, another is, where goods are lent for a uſe, in which the lender has *a common intereſt* with the borrower: in this caſe, as in other bailments *reciprocally* advantageous, the bailee can be reſponſible for no more than *ordinary* negligence; as, if *Stephen* and *Philip* invite ſome common friends to an entertainment prepared at their joint expence, for which purpoſe *Philip* lends a ſervice of plate to his companion, who undertakes the whole management of the feaſt, *Stephen* is obliged only to take *ordinary* care of the plate; but this, in truth, is rather the innominate contract *do ut facias*, than a proper *loan*.

Agreeably to this principle, it muſt be decided, that, if goods be lent for the *ſole* advantage of the *lender*, the borrower is anſwerable for *groſs* neglect only; as, if a paſſionate lover of muſick were to lend his own inſtrument to a player in a concert, merely to augment his pleaſure from the performance; but here again, the bailment is not ſo much a *loan*, as a *mandate*; and, if the muſician were to play with all due ſkill and exertion, but were to break or hurt the inſtrument without any malice or very culpable negligence, he would not be bound to indemnify the *amateur*, as he was not in want of the inſtrument,

and had no particular deſire to uſe it. If, indeed, a poor artiſt, having loſt or ſpoiled his violin or flute, be much diſtreſſed by this loſs, and a brother-muſician obligingly, though *voluntarily*, offer to lend him his own, I cannot agree with DESPEISSES, a learned advocate of *Montpellier* and writer on *Roman* law, that the player may be leſs careful of it than any other borrower: on the contrary, he is bound, in conſcience at leaſt, to raiſe his attention even to a higher degree; and his negligence ought to be conſtrued with rigour.

By the law of MOSES, as it is commonly tranſlated, a remarkable diſtinction was made between the loſs of borrowed cattle or goods, happening in the *abſence*, or the *preſence*, of the OWNER; for, ſays the divine legiſlator, "if a "man borrow aught of his neighbour, and it be "hurt or die, *the owner thereof not being with it*, "he ſhall ſurely make it good; but, if the *owner* "thereof *be* with it, he ſhall *not* make it good*:" now it is by no means *certain*, that the original word ſignifies the *owner*, for it *may* ſignify the *poſſeſſor*, and the law *may* import, that the borrower ought not to loſe ſight, when he can poſſibly avoid it, of the thing borrowed; but, if it was intended, that the borrower ſhould always

* Exod. xxii. 14, 15.

anſwer for caſualties, *except in the caſe*, which muſt rarely happen, of *the owner's preſence*, this exception ſeems to prove, that no caſualties were meaned, but ſuch as *extraordinary* care might have prevented; for I cannot ſee, what difference could be made by the preſence of the owner, if the force, productive of the injury, were wholly irreſiſtible, or the accident inevitable.

An old *Athenian* law is preſerved by DEMOSTHENES, from which little can be gathered on account of its generality and the uſe of an ambiguous word*; it is underſtood by PETIT as relating to guardians, mandataries, and commiſſioners; and it is cited by the orator in the caſe of a guardianſhip. The *Athenians* were, probably, ſatisfied with ſpeaking very generally in their laws, and left their juries, for juries they certainly had, to decide favourably or ſeverely, according to the circumſtances of each particular caſe.

IV. As to the degree of diligence, which the law requires from a *pawnee*, I find myſelf again obliged to diſſent from ſir EDWARD COKE, with whoſe opinion a ſimilar liberty has before been taken in regard to a *depoſitary*; for that very learned man

* Περὶ ὧν καθυρῆκέ τις, ὁμοίως ὀφλισκάνειν, ὥσπερ ἂν αὐτὸς ἔχῃ. *Reiſke's* edition, 855. 3. Here the verb καθυρίναι, may imply *ſlight*, or *ordinary*, neglect; or even *fraud*, as *Petit* has rendered it.

lays it down, that, "if goods be delivered to "one as a *gage* or *pledge*, and they be *ſtolen*, "he ſhall be diſcharged, becauſe *he hath a pro-* "*perty* in them; and, *therefore*, he ought to "keep them *no otherwiſe than his own**:" I deny the firſt propoſition, the reaſon, and the concluſion.

Since the bailment, which is the ſubject of the preſent article, is beneficial to the *pawnee* by ſecuring the payment of his debt, *and* to the *pawnor* by procuring him credit, the rule, which natural reaſon preſcribes, and which the wiſdom of nations has confirmed, makes it requiſite for the perſon, to whom a gage or pledge is bailed, to take *ordinary* care of it; and he muſt conſequently be reſponſible for *ordinary* neglect†. This is expreſsly holden by BRACTON; and, when I rely on his authority, I am perfectly aware, that he copied JUSTINIAN almoſt word for word, and that lord HOLT, who makes conſiderable uſe of his treatiſe, obſerves three or four times, "that "he was an *old* author‡;" but, although he had been a civilian, yet he was alſo a great common-lawyer, and never, I believe, adopted the rules and expreſſions of the *Romans*, except when they coincided with the laws of *England*

* 1 Inſt. 89. a. 4 Rep. 83. b. † Bract. 99. b.
‡ Ld. Raym. 915, 916. 919.

in his time: he is certainly the *beſt* of our juridical clafficks; and, as to our *ancient* authors, if their doctrine be *not law*, it muſt be left to mere hiſtorians and antiquaries; but, if it remain unimpeached by any later deciſion, it is not only equally binding with the moſt recent law, but has the advantage of being matured and approved by the collected ſagacity and experience of ages. The doctrine in queſtion has the full aſſent of lord HOLT himſelf, who declares it to be "*ſufficient*, if the pawnee uſe *true*, and *ordi-* "*nary*, diligence for reſtoring the goods, and "that, ſo doing, he will be indemnified, and, "notwithſtanding the loſs, ſhall reſort to the "pawnor for his debt." Now it has been proved, that "a bailee cannot be conſidered "as uſing *ordinary* diligence, who ſuffers the "goods bailed to be taken by *ſtealth* out of his "cuſtody*;" and it follows, that "a pawnee "ſhall not be diſcharged, if the pawn be ſimply "*ſtolen* from him; but if he be forcibly *robbed* "of it *without his fault*, his debt ſhall not be "extinguiſhed.

The paſſage in the *Roman* inſtitutes, which BRACTON has nearly tranſcribed, by no means convinces M. LE BRUN, that a *pawnee* and a *borrower* are not reſponſible for *one and the ſame* degree of negligence; and it is very certain, that

* P. 370. note †.

ULPIAN, ſpeaking of the *Actio pignoratitia*, uſes theſe remarkable words: "Venit in *hac* actione "et *dolus* et *culpa* UT in *commodato*, venit et cuſ- "todia; vis major non venit." To ſolve this difficulty, NOODT has recourſe to a conjectural emendation, and ſuppoſes UT to have been inadvertently written for AT; but, if this was a miſtake, it muſt have been pretty ancient, for the *Greek* tranſlators of this ſentence uſe a particle of ſimilitude, not an adverſative: there ſeems, however, no occaſion for ſo hazardous a mode of criticiſm. ULPIAN has not ſaid, "*talis* culpa *qualis* in commodato;" nor does the word UT imply an *exact* reſemblance: he meaned, that a pawnee was anſwerable for *neglect*, and gave the firſt inſtance, that occurred, of another contract, in which the party was likewiſe anſwerable for *neglect*, but left the *ſort* or *degree* of negligence to be determined by his *general* rule; conformably to which he himſelf expreſsly mentions PIGNUS among other contracts *reciprocally uſeful*, and diſtinguiſhes it from COMMODATUM, whence the borrower *ſolely* derives advantage*.

It is rather leſs eaſy to anſwer the caſe in the book of *Aſſiſe*, which ſeems wholly ſubverſive of my reaſoning, and, if it ſtand unexplained, will break the harmony of my ſyſtem†; for there, in

* Before, p. 370. † 29 Aſſ. pl. 28.

an action of detinue for a hamper, which had been bailed by the plaintiff to the defendant, the bailee pleaded, "that it was delivered to him "*in gage* for a certain ſum of money; that he "had put it among his other goods; and that all "together had been *ſtolen* from him:" now, according to my doctrine, the plaintiff might have demurred to the plea; but he was *driven* to reply, "that he *tendered* the money before the *ſteal*-"*ing*, and that the creditor refuſed to accept it," on which fact iſſue was joined; and the reaſon, aſſigned by the chief juſtice, was, that, "if a "man bail goods to me *to keep*, and I put them "among my own, I ſhall not be charged, if they "be *ſtolen*." To this caſe I anſwer: firſt, that, if the court really made no difference between a *pawnee* and a *depoſitary*, they were indubitably miſtaken; for which aſſertion I have the authority of BRACTON, lord HOLT, and St. GERMAN, who ranks the taker of a *pledge* in the ſame claſs with a *hirer* of goods*; next, that in a much later caſe, in the reign of HEN. VI. where a *hiring of cuſtody* ſeems to be meaned, the diſtinction between a *theft* and a *robbery* is taken agreeably to the *Roman* law†; and, laſtly, that, although in the ſtrict propriety of our *Engliſh* language, to *ſteal* is to take *clandeſtinely*, and to *rob*

* Doct. and Stud. *dial* 2. *ch.* 38.

† Before, p. 370. note†.

is to ſeize by *violence*, correſponding with the *Norman* verbs *embleer* and *robber*, yet thoſe words are ſometimes uſed inaccurately; and I always ſuſpected, that the caſe in the book of *Aſſiſe* related to a *robbery*, or a taking *with force*; a ſuſpicion confirmed beyond any doubt by the judicious BROOK, who abridges this very caſe with the following title in the margin, "Que ſerra "al perde, quant les biens ſont *robbes**:" and, in a modern work, where the old caſes are referred to, it appears to have been ſettled, in conformity to them and to reaſon, "that if the pawn be laid "up, and the pawnee be *robbed*, he ſhall not be "anſwerable†:" but lord COKE ſeems to have uſed the word *ſtolen* in its proper ſenſe, becauſe he plainly compares a pawn with a depoſit.

If, indeed, the thing pledged be taken *openly* and *violently* through the *fault* of the pledgee, he ſhall be reſponſible for it; and, after a *tender* and *refuſal* of the money owed, which are equivalent to actual *payment*, *the whole property is inſtantly reveſted in the pledgor*, and he may conſequently maintain an action of trover‡: it is ſaid in a moſt uſeful work, that by ſuch tender and refuſal the thing pawned "ceaſes to be a pledge and "becomes a *depoſit*§;" but this muſt be an error

* Abr. *tit.* Bailment, pl. 7. † 2 Salk. 522.
‡ 29 Aſſ. pl. 28. Yelv. 179. *Ratcliff* and *Davis*.
§ Law of *Niſi Prius*, 72.

of impreſſion; for there can never be a *depoſit* without the owner's conſent, and a *depoſitary* would be chargeable only for *groſs* negligence, whereas the pawnee, whoſe ſpecial property is determined by the wrongful detainer, becomes liable *in all poſſible events* to make good the thing loſt, or to relinquiſh his debt*.

The reaſon, given by COKE for his doctrine, namely, "becauſe the pawnee has a *property* in "the goods pledged," is applicable to every other ſort of bailment, and proves nothing in regard to any *particular* ſpecies; for every bailee has a temporary *qualified* property in the things, of which poſſeſſion is delivered to him by the bailor, and has, therefore, a poſſeſſory action or an appeal in his own name againſt any ſtranger, who may damage or purloin them†. By the *Roman* law, indeed, "even the poſſeſſion of the "depoſitary was holden to be that of the perſon "depoſiting;" but with us the general bailee has unqueſtionably a *limited* property in the goods intruſted to his care: he may not, however, *uſe* them on any account without the conſent of the owner, either expreſsly given, if it can poſſibly be obtained, or at leaſt ſtrongly preſumed; and this preſumption varies, as the thing is likely to be better, or worſe, or not at all af-

* Ld. Raym. 917. † Yearb. 21 Hen. VII. 14. b. 15. a.

fected, by uſage; ſince, if *Caius* depoſit a *ſetting-dog* with *Titius*, he can hardly be ſuppoſed unwilling, that the dog ſhould be uſed for partridge-ſhooting, and thus be confirmed in thoſe habits, which make him valuable; but, if *clothes* or *linen* be depoſited by him, one can ſcarce imagine, that he would ſuffer them to be worn; and, on the other hand, it may juſtly be inferred, that he would gladly indulge *Titius* in the liberty of uſing the *books*, of which he had the cuſtody; ſince even moderate care would prevent them from being injured. In the ſame manner it has been holden, that the pawnee of goods, which will be *impaired* by uſage, cannot uſe them; but it would be otherwiſe, I apprehend, if the things pawned actually *required* exerciſe and a continuance of habits, as ſporting-dogs and horſes: if they cannot be hurt by being worn, they may be uſed, but *at the peril* of the pledgee; as, if chains of gold, ear-rings, or bracelets, be left in pawn with a lady, and ſhe wear them at a publick place, and be *robbed* of them on her return, ſhe muſt make them good: "if ſhe keeps "them in a bag," ſays a learned and reſpectable writer, "and they are *ſtolen*, ſhe ſhall not be "charged*;" but the bag could hardly be taken *privately and quietly* without her omiſſion of *or-*

* Law of *Niſi Prius*, 72.

dinary diligence; and the manner, in which lord HOLT puts the caſe, eſtabliſhes my ſyſtem, and confirms the anſwer juſt offered to the caſe from the Year-book; for, "if ſhe keep the jewels," ſays he, "*locked up* in her cabinet, and "her cabinet be *broken open*, and the jewels taken "thence, ſhe will not be anſwerable*." Again; it is ſaid, that, where the pawnee is at any expenſe to maintain the thing given in pledge, as, if it be a horſe or a cow, he may ride the horſe moderately, and milk the cow regularly, by way of compenſation for the charge†; and this doctrine muſt be equally applicable to a general bailee, who ought neither to be injured nor benefited in any reſpect by the truſt undertaken by him; but the *Roman* and *French* law, more agreeably to principle and analogy, permits indeed both the pawnee and the depoſitary to milk the cows delivered to them, but requires them to account with the reſpective owners for the value of the milk and calves, deducting the reaſonable charges of their nouriſhment‡. It follows from theſe remarks, that lord COKE has aſſigned an inadequate reaſon for the degree of diligence, which is demanded of a pawnee; and the true reaſon is, that the law requires nothing *extraordinary* of him.

* Ld. Raym. 917. † Ow. 124.
‡ Poth. *Dépôt*, n. 47. *Nantiſſement*, n. 35.

But, if the receiver in pledge *were* the only bailee, who had a *ſpecial property* in the thing bailed, it could not be logically inferred, "that, "*therefore*, he ought to keep it merely *as his* "*own*:" for, even if *Caius* have an abſolute undivided property in goods, jointly or in common with *Septimius*, he is bound by rational, as well as poſitive, law to take *more* care of them *than of his own*, unleſs he be in fact a prudent and thoughtful manager of his own concerns; ſince every man ought to uſe *ordinary* diligence in affairs, which intereſt *another* as well as himſelf: "*Aliena* negotia," ſays the emperor CONSTANTINE, "*exacto* officio geruntur*."

The concluſion, therefore, drawn by ſir EDWARD COKE, is no leſs illogical than his premiſſes are weak; but here I muſt do M. LE BRUN the juſtice to obſerve, that the argument, on which his whole ſyſtem is founded, occurred likewiſe to the great oracle of *Engliſh* law; namely, that a perſon, who had a *property* in things committed to his charge, was only obliged to be *as careful of them as of his own* goods; which may be very true, if the ſentence be predicated of a man *ordinarily* careful of his own; and, if that was LE BRUN's hypotheſis, he has done little more than adopt the ſyſtem of GODE-

* C. 4. 35. 21.

FROI, who exacts *ordinary* diligence from a *partner* and a *co-proprietor*, but requires a *higher* degree in eight of the ten preceding contracts.

Pledges for debt are of the higheſt antiquity: they were uſed in very early times by the roving *Arabs*, one of whom finely remarks, "that the "life of man is no more than a *pledge* in the hands "of Deſtiny;" and the ſalutary laws of MOSES, which forbade certain implements of huſbandry and a widow's raiment to be given in pawn, deſerve to be imitated as well as admired. The diſtinction between *pledging*, where poſſeſſion is transferred to the creditor, and *hypothecation*, where it remains with the debtor, was originally *Attick*; but ſcarce any part of the *Athenian* laws on this ſubject can be gleaned from the ancient orators, except what relates to bottomry in five ſpeeches of DEMOSTHENES.

I cannot end this article, without mentioning a ſingular caſe from a curious manuſcript preſerved at *Cambridge*, which contains a collection of queries in *Turkiſh*, together with the deciſions or conciſe anſwers of the MUFTI at *Conſtantinople*: it is commonly imagined, that the *Turks* have a tranſlation in their own language of the *Greek* code, from which they have ſupplied the defects of their *Tartarian* and *Arabian* juriſprudence*;

* *Duck* de Auth. Jur. Civ. Rom. I. 2. 6.

but I have not met with any ſuch tranſlation, although I admit the conjecture to be highly probable, and am perſuaded, that their numerous treatiſes on *Mahomedan* law are worthy on many accounts of an attentive examination. The caſe was this: "*Zaid* had left with *Amru* divers "goods in pledge for a certain ſum of money, "and ſome *ruffians*, having entered the houſe of "*Amru*, took away his own goods together "with thoſe pawned by *Zaid*." Now we muſt neceſſarily ſuppoſe, that the creditor had by *his own fault* given occaſion to this robbery; otherwiſe we may boldly pronounce, that the *Turks* are wholly unacquainted with the imperial laws of BYZANTIUM, and that their own rules are totally repugnant to natural juſtice; for the party proceeds to aſk, "whether, *ſince the debt became* "*extinct by the loſs of the pledge*, and ſince the "goods pawned exceeded in value the amount "of the debt, *Zaid* could legally demand the "balance of *Amru*;" to which queſtion the great law-officer of the *Othman* court anſwered with the brevity uſual on ſuch occaſions, OLMAZ, *It cannot be**. This cuſtom, we muſt con-

* Publ. Libr. Cambr. MSS. Dd. 4. 3. See Wotton, LL. *Hywel Dda*. lib. 2. cap. 2. § 29. *note* x. It may *poſſibly* be the uſage in *Turkey* to *ſtipulate* "ut amiſſio pignoris liberet de-"bitorem," as in C. 4. 24. 6.

feſs, of propoſing caſes both of law and conſcience under *feigned* names to the ſupreme judge, whoſe anſwers are conſidered as ſolemn *decrees*, is admirably calculated to prevent partiality and to ſave the charges of litigation.

V. The laſt ſpecies of bailment is by no means the leaſt important of the five, whether we conſider the infinite convenience and daily uſe of the contract itſelf, or the variety of its branches, each of which ſhall now be ſuccinctly, but accurately, examined.

1. *Locatio*, or *locatio-conductio*, REI, is a contract, by which the hirer gains a tranſient qualified property in the *thing* hired, and the owner acquires an abſolute property in the ſtipend, or price, of the hiring; ſo that, in truth, it bears a ſtrong reſemblance to the contract of *emptio-venditio*, or SALE; and, ſince it is advantageous to *both* contracting parties, the harmonious conſent of nations will be interrupted, and one object of this eſſay defeated, if the laws of *England* ſhall be found, on a fair inquiry, to demand of the hirer a *more than ordinary* degree of diligence. In the moſt recent publication, that I have read on any legal ſubject, it is expreſsly ſaid, "that the hirer is to take *all imaginable* "care of the goods delivered for hire*:" the

* Law of *Niſi Prius*, 3d edition corrected, 72.

words *all imaginable*, if the principles before eſtabliſhed be juſt, are too ſtrong for practice even in the ſtrict caſe of *borrowing*; but, if we take them in the mildeſt ſenſe, they muſt imply an *extraordinary* degree of care; and this doctrine, I preſume, is founded on that of lord HOLT in the caſe of COGGS *and* BERNARD, where the great judge lays it down, "that, if goods are let out "for a *reward*, the *hirer* is bound to the UTMOST "diligence, ſuch as the MOST *diligent father of* "*a family* uſes*." It may ſeem bold to controvert ſo reſpectable an opinion; but, without inſiſting on the palpable injuſtice of making a *borrower* and a *hirer* anſwerable for preciſely the *ſame* degree of neglect, and without urging, that the point was not then before the court, I will engage to ſhow, by tracing the doctrine up to its real ſource, that the *dictum* of the chief juſtice was entirely grounded on a grammatical miſtake in the tranſlation of a ſingle *Latin* word.

In the firſt place, it is indubitable, that his lordſhip relied *ſolely* on the authority of BRACTON; whoſe words he cites at large, and immediately ſubjoins, "*whence it appears, &c.*" now the words, "'talis ab eo deſideratur cuſtodia, "qualem DILIGENTISSIMUS *paterfamilias* ſuis

* Ld. Raym. 916.

" rebus adhibit," on which the whole queſtion depends, are copied exactly from JUSTINIAN*, who informs us in the *proeme* to his Inſtitutes, that his deciſions in that work were extracted *principally from the Commentaries of* GAIUS; and the epithet *diligentiſſimus* is in fact uſed by this ancient lawyer †, *and by him alone,* on the ſubject of hiring: but GAIUS is remarked for writing with energy, and for being fond of uſing *ſuperlatives,* where all other writers are ſatisfied with *poſitives*‡; ſo that his forcible manner of expreſſing himſelf, in this inſtance as in ſome others, miſled the compilers employed by the Emperor, whoſe words THEOPHILUS rendered more than literally, and BRACTON tranſcribed; and thus an epithet, which ought to have been tranſlated *ordinarily* diligent, has been ſuppoſed to mean *extremely* careful. By rectifying this miſtake, we reſtore the broken harmony of the *pandects* with the *inſtitutes,* which, together with the *code,* form *one connected work*§, and, when properly underſtood, explain and illuſtrate each other; nor is it neceſſary, I conceive, to adopt the interpretation of M. DE FERRIERE, who ima-

* Bract. 62. b. Juſtin. Inſt. 3. 25. 5. where *Theophilus* has ὁ σφόδρα ἐπιμελέστατος.

† D. 19. 2. 25. 7. ‡ Le Brun, p. 93. § Burr. 426.

gines, that both JUSTINIAN and GAIUS are ſpeaking only of caſes, which *from their nature* demand *extraordinary* care *.

There is no authority then againſt the rule, which requires of a *hirer* the ſame degree of diligence, that *all prudent men*, that is, *the generality of mankind*, uſe in keeping their own goods; and the juſt diſtinction between *borrowing* and *hiring*, which the *Jewiſh* lawgiver emphatically makes, by ſaying, "if it be an hired thing, *it came for its hire* †," remains eſtabliſhed by the concurrent wiſdom of nations in all ages.

If *Caius* therefore hire a horſe, he is bound to ride it as moderately and treat it as carefully, as any man of *common diſcretion* would ride and treat his own horſe; and if, through his negligence, as by leaving the door of his ſtable open at night, the horſe be *ſtolen*, he muſt anſwer for it; but not if he be *robbed* of it by highwaymen, unleſs by his imprudence he gave occaſion to the robbery, as by travelling at unuſual hours, or by taking an unuſual road: if, indeed, he hire a carriage and any number of horſes, and the owner ſend with them his poſtilion or coachman, *Caius* is diſcharged from all attention to the horſes, and remains obliged only to

* *Inſt.* vol. V. p. 138. † Exod. xxii. 15.

take ordinary care of the glaſſes and inſide of the carriage, while he ſits in it.

Since the negligence of a ſervant, *acting under his maſter's directions expreſs or implied*, is the negligence of the maſter, it follows, that, if the *ſervant* of *Caius* injure or kill the horſe by riding it immoderately, or, by leaving the ſtable-door open, ſuffer thieves to ſteal it, *Caius* must make the owner a compenſation for his loſs*; and it is juſt the ſame, if he take a ready-furniſhed lodging, and his gueſts, or ſervants, while they act under the authority given by him, damage the furniture by the omiſſion of ordinary care. At *Rome* the law was not quite ſo rigid; for POMPONIUS, whoſe opinion on this point was generally adopted, made the maſter liable, only *when he was culpably negligent in admitting careleſs gueſts or ſervants*, whoſe bad qualities he ought to have known †: but this diſtinction muſt have been perplexing enough in practice; and the rule, which, by making the head of a family anſwerable indiſcriminately for the faults of thoſe, whom he receives or employs, compels him to keep a vigilant eye on all his domeſticks, is not only more ſimple, but more conducive to the publick ſecurity, although it may be rather harſh

* Salk. 282. Ld. Raym. 619. † D. 19. 2. 11.

in ſome particular inſtances *. It may here be obſerved, that this is the only contract, to which the *French*, from whom our word *bailment* was borrowed, apply a word of the ſame origin; for the letting of a houſe or chamber for hire is by them called *bail à loyer*, and the letter for hire, *bailleur*, that is, *bailor*, both derived from the old verb *bailler*, to deliver; and, though the contracts, which are the ſubject of this eſſay, be generally confined to *moveable* things, yet it will not be improper to add, that, if *immoveable* property, as an orchard, a garden, or a farm, be letten by parol, with no other ſtipulation than for the price or rent, the leſſee is bound to uſe the ſame diligence in preſerving the trees, plants, or implements, that *every prudent perſon* would uſe, if the orchard, garden, or farm, were his own.

2. *Locatio* OPERIS, which is properly ſubdiviſible into two branches, namely, *faciendi*, and *mercium vehendarum*, has a moſt extenſive influence in civil life; but the principles, by which the obligations of the contracting parties may be aſcertained, are no leſs obvious and rational, than the objects of the contract are often vaſt and important †.

* Poth. *Louage*, n. 193.

† It may be uſeful to mention a nicety of the *Latin* language in the application of the verbs *locare* and *conducere*: the em-

If *Titius* deliver ſilk or velvet to a tailor for a ſuit of clothes, or a gem to a jeweller to be ſet or engraved, or timber to a carpenter for the rafters of his houſe, the tailor, the engraver, and the builder, are not only obliged to perform their ſeveral undertakings in a workmanly manner*: but, *ſince they are entitled to a reward*, either by expreſs bargain or by implication, they muſt alſo take *ordinary* care of the things reſpectively bailed to them: and thus, if a horſe be delivered either to an agiſting farmer for the purpoſe of depaſturing in his meadows, or to an hoſtler to be dreſſed and fed in his ſtable, the bailees are anſwerable for the loſs of the horſe, if it be occaſioned by the *ordinary* neglect of themſelves or their ſervants. It has, indeed, been adjudged, that, if the horſe of a gueſt be ſent *to paſture* by *the owner's deſire*, the innholder is not, *as ſuch*, reſponſible for the loſs

ployer, who gives the reward, is *locator operis*, but *conductor operarum*; while the party employed, who receives the pay, is *locator operarum*, but *conductor operis*. HEINECC. in *Pand.* par. 3. § 320. So, in *Horace*,

" Tu ſecanda marmora
" *Locas*"—

which the ſtonehewer or maſon *conduxit*.

* 1 Ventr. 268. erroneouſly printed 1 *Vern.* 268. in all the editions of *Bl. Comm.* II. 452. The innumerable multitude of inaccurate or idle references, in our beſt reports and law-tracts, is the bane of the ſtudent and of the practiſer.

of him by *theft* or accident*; and, in the caſe of MOSLEY and FOSSET, an action againſt an agiſter for keeping a horſe *ſo negligently that it was ſtolen*, is ſaid to have been held maintainable *only* by reaſon of a *ſpecial* aſſumption †; but the caſe is differently reported by ROLLE, who mentions no ſuch reaſon; and, according to him, chief juſtice POPHAM advanced generally, in conformity to the principles before eſtabliſhed, that, "if a man, to whom horſes are "bailed for agiſtment, *leave open the gates of* "*his field*, in conſequence of which neglect "they ſtray and are *ſtolen*, the owner has an "action againſt him:" it is the ſame, if the innkeeper ſend his gueſt's horſe to a meadow *of his own accord*, for he is bound to keep ſafely all ſuch things as his gueſts depoſit *within his inn*, and ſhall not diſcharge himſelf by his own act from that obligation; and, even when he turns out the horſe *by order of the owner*, and receives pay for his graſs and care, he is chargeable, ſurely, for *ordinary* negligence, as *a bailee for hire*, though not *as an innkeeper* by the general cuſtom of the realm. It may be worth while to inveſtigate the reaſons of this *general cuſtom*, which in truth means no more than *common law*, concerning innholders*.

* 8 Rep. 32. *Cayle's* caſe, † Mo. 543. 1 Ro. Abr. 4.
‡ Reg. Orig. 105. a. Noy, Max. ch. 43.

Although a ſtipend or reward in *money* be the eſſence of the contract called *locatio*, yet the ſame reſponſibility for neglect is juſtly demanded in any of the *innominate* contracts, or, whenever a valuable conſideration of any kind is given or ſtipulated. This is the caſe, where the contract *do ut des* is formed by a *reciprocal bailment for uſe*, as if *Robert* permit *Henry* to uſe his *pleaſure-boat* for a day, *in conſideration* that *Henry* will give him the uſe of his *chariot* for the ſame time; and ſo in ten thouſand inſtances, that might be imagined, of *double bailments:* this too is the caſe, if the *abſolute* property of one thing be given as an equivalent for the *temporary* or limited property of another, as if *Charles* give *George* a brace of pointers for the uſe of his *hunter* during the ſeaſon. The ſame rule is applicable to the contract *facio ut facias*, where two perſons agree to perform *reciprocal works*; as if a maſon and a carpenter have each *reſpectively* undertaken to build an edifice, and they mutually agree, that the firſt ſhall finiſh all the maſonry, and the ſecond all the wood-work, in their reſpective buildings; but, if a goldſmith make a bargain with an architect to give him a quantity of wrought plate for building his houſe, this is the contract *do ut facias*, or *facio ut des*; and, in all theſe caſes, the bailees muſt anſwer for the omiſſion of *ordinary* diligence in preſerv-

ing the things, with which they are intruſted: ſo, when *Jacob* undertook the care of *Laban's* flocks and herds for no leſs a reward than his younger daughter, whom he loved ſo paſſionately, *that ſeven years were in his eyes like a few days,* he was bound to be juſt as vigilant, as if he had been paid in ſhekels of ſilver.

Now the obligation is preciſely the ſame, as we have already hinted*, when a man takes upon himſelf the cuſtody of goods *in conſequence and conſideration of another gainful contract*; and, though an innholder be not paid in *money* for ſecuring the traveller's trunk, yet the gueſt *facit ut faciat*, and alights at the inn, not ſolely for his own refreſhment, but alſo that his goods may be ſafe: independently of this reaſoning, the cuſtody of the goods may be conſidered as *acceſſary* to the principal contract, and the money paid for the apartments as extending to the care of the box or portmanteau; in which light GAIUS and, as great a man as he, lord HOLT, ſeem to view the obligation; for they agree, "that, although a bargeman "and a maſter of a ſhip receive their fare for "the paſſage of travellers, and an innkeeper "his pay for the accommodation and enter-"tainment of them, but have no pecuniary re-"ward for the *mere cuſtody* of the goods be-

* P. 375, 376.

" longing to the paſſengers or gueſts, yet they " are obliged to take *ordinary* care of thoſe " goods; as a fuller and a mender are paid for " their *ſkill only*, yet are anſwerable, *ex locato*, " for *ordinary* neglect, if the clothes be loſt or " damaged*."

In whatever point of view we conſider this bailment, no more is *regularly* demanded of the bailee than the care, which *every prudent man* takes of his own property; but it has long been holden, that an *innkeeper* is bound to reſtitution, if the trunks or parcels of his gueſts, committed to him either perſonally or through one of his agents, be damaged *in his inn*, or *ſtolen out of it*, by *any perſon whatever* †; nor ſhall he diſcharge himſelf from this reſponſibility by a refuſal to take any care of the goods, *becauſe there are ſuſpected perſons in the houſe, for whoſe conduct he cannot be anſwerable*‡: it is otherwiſe, indeed, if he refuſe admiſſion to a traveller, becauſe he really has no room for him, and the traveller, nevertheleſs, inſiſt upon entering, and place his baggage in a chamber without the keeper's conſent §.

Add to this, that, if he fail to provide honeſt *ſervants* and honeſt *inmates*, according to the confidence repoſed in him by the publick, his

* D. 4. 9. 5. and 12 Mod. 487.

† Yearb. 10 Hen. VII. 26. 2 Cro. 189.

‡ Mo. 78. § Dy. 158. b. 1 And. 29.

negligence in that reſpect is highly culpable, and he ought to anſwer *civilly* for their acts, even if they ſhould *rob* the gueſts, who ſleep in his chambers*. Rigorous as this law may ſeem, and hard as it may actually be in one or two particular inſtances, it is founded on the great principle of publick utility, to which all private conſiderations ought to yield; for travellers, who muſt be numerous in a rich and commercial country, are obliged to rely almoſt implicitly on the good faith of innholders, whoſe education and morals are uſually none of the beſt, and who might have frequent opportunities of aſſociating with ruffians or pilferers, while the injured gueſt could ſeldom or never obtain legal proof of ſuch combinations, or even of their *negligence*, if no actual fraud had been committed by them. Hence the Prætor declared, according to POMPONIUS, *his deſire of ſecuring the public from the diſhoneſty of ſuch men*, and by his *edict* gave an action againſt them, if the goods of travellers or paſſengers were loſt or hurt by any means, except *damno fatali*, or by *inevitable accident*; and ULPIAN intimates, that even this ſeverity could not reſtrain them from knaviſh practices or ſuſpicious neglect†.

* 1 Bl. Comm. 430. † D. 4. 9. 1. and 3.

In all ſuch caſes, however, it is competent for the innholder to repel the *preſumption* of his knavery or default, by *proving* that he took *ordinary* care, or that the *force*, which occaſioned the loſs or damage, was truly *irreſiſtible*.

When a private man demands and receives a compenſation for the *bare cuſtody* of goods in his warehouſe or ſtore-room, this is *not* properly a *depoſit*, but a *hiring of care and attention*: it may be called *locatio cuſtodiæ*, and might have been made a diſtinct branch of this laſt ſort of bailment, if it had not ſeemed uſeleſs to multiply ſubdiviſions; and the bailee may ſtill be denominated *locator operæ*, ſince the *vigilance and care*, which he *lets out* for pay, are in truth a mental *operation*. Whatever be his appellation, either in *Engliſh* or *Latin*, he is clearly reſponſible, like other intereſted bailees, for *ordinary* negligence; and, although St. GERMAN ſeems to make no difference in this reſpect between *a keeper of goods for hire* and *a ſimple depoſitary*, yet he uſes the word DEFAULT, like the CULPA of the *Romans*, as a generical term, and leaves the *degree* of it to be aſcertained by the rules of law*.

In the ſentence immediately following, he makes a very material diſtinction between the two contracts; for, "if a man, ſays he, have

* *Doct.* and *Stud.* where before cited.

" *a certain recompenſe* for the keeping of goods, " and promiſe, at the time of the delivery, *to* " *redeliver them ſafe at his peril*, then he ſhall " be charged with *all chances*, that may befall; " but, if he make *that* promiſe, and *have* " *nothing* for keeping them, he is bound to *no* " *caſualties*, but ſuch as are wilful, and happen " *by his own default:*" now the word PERIL, like *periculum*, from which it is derived, is in itſelf ambiguous, and ſometimes denotes the *riſk* of *inevitable miſchance*, ſometimes the *danger* ariſing from *a want of due circumſpection*; and *the ſtronger ſenſe* of the word *was taken* in the firſt caſe *againſt him, who uttered it*; but, in the ſecond, where the conſtruction is favourable, the *milder* ſenſe was juſtly preferred*. Thus, when a perſon, who, if he were wholly *unintereſted*, would be a *mandatary*, undertakes for a *reward* to perform *any work*, he muſt be conſidered as bound ſtill more ſtrongly, *to uſe a degree of diligence adequate to the performance of it:* his obligation muſt be rigorouſly conſtrued, and he would, perhaps, be anſwerable for *ſlight* neglect, where no more could be required of a *mandatary* than *ordinary* exertions. This is the caſe of commiſſioners, factors, and bailiffs, when their undertaking *lies in feſance*, and not ſimply

* See before, p. 370.

in *cuſtody*: hence, as peculiar care is demanded in removing and raiſing a fine column of granate or porphyry, without injuring the ſhaft or the capital, GAIUS ſeems to exact *more than ordinary* diligence from the undertaker of ſuch a work for a ſtipulated compenſation*. Lord COKE conſiders a factor in the light of a *ſervant*, and thence deduces his obligation; but, with great ſubmiſſion, his *reward* is the true reaſon, and *the nature of the buſineſs* is the juſt meaſure, of his duty†; which cannot, however, extend to a reſponſibility for *mere accident* or *open robbery*‡; and, even in the caſe of *theft*, a factor has been holden excuſed, when he ſhowed, "that he had *laid up* the goods of his principal "in a warehouſe, out of which they were "*ſtolen* by certain malefactors to him un-"known §."

Where *ſkill* is required, as well as *care*, in performing the work undertaken, the bailee for *hire* muſt be ſuppoſed to have engaged himſelf for *a due application of the neceſſary art*: it is his own fault, if he undertake a work above his ſtrength; and all, that has before been advanced on this head concerning a *mandatary*, may be applied with much greater force to a *conductor*

* D. 19. 2. 7. † 4 Rep. 84. Ld. Raym. 918.

‡ 1 Inſt. 89. a. § 1 Vent. 121. *Vere* and *Smith*.

*operis faciendi**. I conceive, however, that, where the bailor has not been deluded by any but himſelf, and voluntarily employs in one art a man, who openly exerciſes another, his folly has no claim to indulgence; and that, unleſs the bailee make falſe pretenſions, or a *ſpecial* undertaking, no more can fairly be demanded of him than the beſt of his ability†. The caſe, which SADI relates with elegance and humour in his *Guliſtan* or *Roſe-Garden*, and which PUFENDORF cites with approbation‡, is not inapplicable to the preſent ſubject, and may ſerve as a ſpecimen of *Mahomedan law*, which is not ſo different from ours, as we are taught to imagine: 'A man, who had a diſ-'order in his eyes, called on a *farrier* for a re-'medy; and he applied to them a medicine 'commonly uſed for *his* patients: the man loſt 'his ſight, and brought an action for damages; 'but the judge ſaid, "No action lies, for, if "the complainant had not himſelf been an *aſs*, "he would never have employed a *farrier*;" 'and SADI proceeds to intimate, that, "if a "perſon will employ a common *mat-maker* to "weave or embroider *a fine carpet*, he muſt "impute the bad workmanſhip to his own "folly§."

* *Spondet*, ſay the *Roman* lawyers, *peritiam artis*.

† P. 381. ‡ De Jure Nat. et Gent. lib. 5. cap. 5. § 3.

§ Roſar. Polit. cap. 7. There are numberleſs tracts in

In regard to the diſtinction before-mentioned between the *non*feſance and the *mis*feſance of a workman*, it is *indiſputably* clear, that an action lies in *both* caſes for a reparation in damages, whenever the work was undertaken for a *reward*, either actually paid, *expreſsly* ſtipulated, or, in the caſe of a *common* trader, ſtrongly *implied*; of which BLACKSTONE gives the following inſtance: "If a *builder* promiſes, "undertakes, or aſſumes to *Caius*, that he will "build and cover his houſe within a time li-"mited, and fails to do it, *Caius* has an action "on the caſe againſt the builder for this breach "of his expreſs promiſe, and ſhall recover a "pecuniary ſatisfaction for the injury ſuſtained "by ſuch delay†." The learned author meaned; I preſume, a *common* builder, or ſuppoſed a *conſideration* to be given; and for this reaſon I forbore to cite his doctrine as in point on the ſubject of an action for the *non*performance of a *mandatary*‡.

Before we leave this article, it ſeems proper to remark, that every bailee for *pay*, whether

Arabick, *Perſian*, and *Turkiſh*, on every branch of juriſprudence; from the beſt of which it would not be difficult to extract a complete ſyſtem, and to compare it with our own; nor would it be leſs eaſy, to explain in *Perſian* or *Arabick* ſuch parts of our *Engliſh* law, as either coincide with that of the *Aſiaticks*, or are manifeſtly preferable to it.

* P. 382, &c. † 3 Comm. 157. ‡ P. 383, 384, 385.

conductor rei or *conductor operis*, muſt be ſuppoſed to know, that the goods and chattels of his bailor are in *many* caſes *diſtrainable* for rent, if his landlord, who might otherwiſe be ſhamefully defrauded, find them on the premiſſes*; and, as they cannot be diſtrained and ſold without his *ordinary* default *at leaſt*, the owner has a remedy over againſt him, and muſt receive a compenſation for his loſs†: even if a *depoſitary* were to remove or conceal *his own* goods, and thoſe of his depoſitor were to be ſeized for rent-arrere, he would unqueſtionably be bound to make reſtitution; but there is no obligation in the bailee to *ſuggeſt wiſe precautions againſt inevitable accident*; and he cannot, therefore, be obliged *to adviſe inſurance from fire*; much less *to inſure* the things bailed without an authority from the bailor.

It may be right alſo to mention, that the diſtinction, before taken in regard to *loans*‡, between an obligation to reſtore the *ſpecifick* things, and a power or neceſſity of returning *others equal in value*, holds good likewiſe in the contracts of *hiring* and *depoſiting*: in the firſt caſe, it is a regular *bailment*; in the ſecond, it becomes a *debt*. Thus, according to ALFENUS in his famous law, on which the judicious

* Burr. 1498. &c. † 3. Bl. Comm. 8. ‡ P. 394.

BYNKERSHOEK has learnedly commented, "if "an ingot of ſilver be delivered to a ſilver-"ſmith to make an urn, the *whole* property is "transferred, and the employer is only a *credi-*"*tor* of metal equally valuable, which the "workman engages to *pay* in a certain ſhape*:" the ſmith may conſequently apply it to his own uſe; but, if it periſh, even by unavoidable miſchance or irreſiſtible violence, he, as owner of it, muſt abide the loſs, and the creditor muſt have his urn in due time. It would be otherwiſe, no doubt, if the *ſame* ſilver, on account of its peculiar fineneſs, or any uncommon metal, according to the whim of the owner, were agreed to be *ſpecifically* redelivered in the form of a cup or a ſtandiſh.

3. *Locatio operis* MERCIUM VEHENDARUM is a contract, which admits of many varieties in *form*, but of none, as it ſeems *at length* to be ſettled, in the *ſubſtantial* obligations of the bailee.

A *carrier for hire* ought, by the rule, to be reſponſible only for *ordinary* neglect; and, in the time of HENRY VIII. it appears to have been generally holden, "that a *common* carrier "was chargeable, in caſe of a loſs by *robbery*, "only when he had travelled by *ways danger-*

* D. 19. 2. 31. Bynk. *Obſ. Jur. Rom.* lib. VIII.

" *ous for robbing*, or driven by *night*, or at any " *inconvenient hour** :" but, in the commercial reign of ELIZABETH, it was reſolved, upon the ſame broad principles of policy and convenience that have been mentioned in the caſe of *innholders*, " that, if a *common carrier* be *robbed* " of the goods delivered to him, he ſhall an- " ſwer for the value of them†."

Now the *reward* or *hire*, which is conſidered by ſir EDWARD COKE as the reaſon of this deciſion, and on which the principal ſtreſs is often laid in our own times, makes the carrier liable, indeed, for the omiſſion of *ordinary* care, but cannot extend to *irreſiſtible force*; and, though ſome other bailees have a *recompenſe*, as *factors* and *workmen for pay*, yet, even in *Woodliefe's* caſe, the chief juſtice admitted, that *robbery* was a good plea for a *factor*, though it was a bad one for a *carrier*: the true ground of that reſolution is the *publick employment* exerciſed by the carrier, and the danger of his combining with *robbers* to the infinite injury of commerce and extreme inconvenience of ſociety ‡.

The modern rule concerning a *common* carrier is, that " nothing will excuſe him, except *the*

* Doct. and Stud. where often before cited.

† 1 Inſt. 89. a. Mo. 462. 1 Ro. Abr. 2. *Woodliefe* and *Curties*.

‡ Ld. Raym. 917. 12 Mod. 487.

"*act of* GOD, or of *the King's enemies**;" but a momentary attention to the principles muſt convince us, that this exception is in truth part of the rule itſelf, and that the reſponſibility for a loſs by *robbers* is only an exception to it: a carrier is *regularly* anſwerable for neglect, but not, *regularly*, for damage occaſioned by the attacks of *ruffians*, any more than for *hoſtile* violence, or unavoidable *misfortune*; but the great maxims of policy and good government make it neceſſary to *except* from this rule the caſe of *robbery*, leſt confederacies ſhould be formed between carriers and deſperate villains with little or no chance of detection.

Although the *Act of God*, which the ancients too called Θεῖ βίαν and *Vim divinam*, be an expreſſion, which long habit has rendered familiar to us, yet perhaps, on that very account, it might be more proper, as well as more decent, to ſubſtitute in its place *inevitable accident*: religion and reaſon, which can never be at variance without certain injury to one of them, aſſure us, that "not a guſt of wind blows, nor "a flaſh of lightning gleams, without the "knowledge and guidance of a ſuperintending "mind;" but this doctrine loſes its dignity and ſublimity by a technical application of it,

* Law of *Niſi Prius*, 70, 71.

which may in ſome inſtances border even upon profaneneſs; and law, which is merely a practical ſcience, cannot uſe terms too popular and perſpicuous.

In a recent caſe of an action againſt a carrier, it was holden to be no excuſe, "that the ſhip "was tight, when the goods were placed on "board, but that a rat, by gnawing out the "oakum, had made a ſmall hole, through "which the water had guſhed*;" but the true reaſon of this deciſion is not mentioned by the reporter: it was in fact *at leaſt ordinary* negligence, to let a rat do ſuch miſchief in the veſſel; and the *Roman* law has, on this principle, decided, that, "ſi fullo veſtimenta polienda "acceperit, eaque *mures roſerint*, ex locato te-"netur, quia *debuit ab hac re cavere*†."

Whatever doubt there may be, among civilians and common-lawyers, in regard to *a caſket, the contents of which are concealed from the* DEPOSITARY‡, it ſeems to be generally underſtood, that *a common carrier is* anſwerable for the loſs of a box or parcel, be he ever ſo *ignorant of its contents*, or be thoſe contents ever ſo valuable, *unleſs* he make a *ſpecial* acceptance§: but *groſs fraud and impoſition* by the bailor will deprive

* 1 Wils. part 1. 281. *Dale* and *Hall.*

† D. 19. 2. 13. 6. ‡ Before, p. 362, 364, 366.

§ 1 Stra. 145. *Titchburn* and *White.*

him of his action, and if there be proof, that the parties were apprized of each other's intentions, although there was no perſonal communication, the bailee may be conſidered as a *ſpecial* acceptor: this was adjudged in a very modern caſe particularly circumſtanced, in which the former caſes in *Ventris*, *Alleyne*, and *Carthew*, are examined with liberality and wiſdom; but, in all of them, too great ſtreſs is laid on the *reward*, and too little on the important motives of *public utility*, which alone diſtinguiſh a *carrier* from other *bailees for hire**.

Though no ſubſtantial difference is aſſignable between carriage by *land* and carriage by *water*, or, in other words, between a *waggon* and a *barge*, yet it ſoon became neceſſary for the courts to declare, as they did in the reign of JAMES I., that a *common hoyman*, like a common *waggoner*, is reſponſible for goods committed to his cuſtody, even if he be *robbed* of them †; but the reaſon ſaid to have been given for this judgement, namely, becauſe *he had his hire*, is not the true one; ſince, as we have before ſuggeſted, the *recompenſe* could only make

* Burr. 2298. *Gibbon* and *Paynton*. See 1 Vent. 238. All. 93. Carth. 485.

† Hob. *ca.* 30. 2 Cro. 330. *Rich* and *Kneeland*. "The "*firſt* caſe of the kind, ſaid lord *Holt*, to be found in our "books." 12 Mod. 480.

him liable for *temerity* and *imprudence*, as if a bargemaſter were raſhly to ſhoot a bridge, *when the bent of the weather is tempeſtuous*; but not for a *mere caſualty*, as if a hoy in good condition, ſhooting a bridge *at a proper time*, were driven againſt a pier by a ſudden breeze, and overſet by the violence of the ſhock*; nor, by parity of reaſon, for any other force too great to be reſiſted†: the *publick* employment of the *hoyman*, and that *diſtruſt*, which an ancient writer juſtly calls the *ſinew of wiſdom*, are the real grounds of the law's rigour in making ſuch a perſon reſponſible for a loſs by *robbery*.

All, that has juſt been advanced concerning a *land*-carrier, may, therefore, be applied to a *bargemaſter* or *boatman*; but, in caſe of a tempeſt, it may ſometimes happen, that the law of *jetſon* and *average* may occaſion a difference. *Barcroft's* caſe, as it is cited by chief juſtice ROLLE, has ſome appearance of hardſhip: "a "box of *jewels* had been delivered to a ferry-"man, *who knew not what it contained*, and, a "ſudden ſtorm ariſing in the paſſage, he threw "the box into the ſea; yet it was reſolved, *that* "*he ſhould anſwer for it*‡:" now I cannot help

* 1 Stra. 128. *Amies* and *Stevens*.

† Palm. 548. W. Jo. 159. See the doctrine of *inevitable accident* moſt learnedly diſcuſſed in *Defid. Heraldi* Animadv. in *Salmaſii* Obſerv. in Jus *Att.* et *Rom.* cap. XV.

‡ All. 93.

ſuſpecting, that there was proof in this caſe of *culpable negligence*, and probably the caſket was both *ſmall* and *light* enough, to have been kept longer on board than other goods; for, in the caſe of *Graveſend* barge, cited on the bench by lord COKE, it appears, that the pack, which was thrown overboard in a tempeſt, and for which the bargeman was holden *not anſwerable*, was of great value *and great weight*; although this laſt circumſtance be omitted by ROLLE, who ſays only, that the maſter of the veſſel had *no information of its contents**.

The ſubtilty of the human mind, in finding diſtinctions, has no bounds; and it was imagined by ſome, that, whatever might be the obligation of a *barge*-maſter, there was no reaſon to be equally rigorous in regard to the maſter of a *ſhip*; who, if he carry goods for *profit*, muſt indubitably anſwer for the *ordinary neglect* of himſelf or his mariners, but ought not, they ſaid, to be chargeable for the violence of *robbers:* it was, however, otherwiſe decided in the great caſe of *Mors* and *Slew*, where "eleven perſons armed "came on board the ſhip *in the river*, under "pretence of *impreſſing ſeamen*, and forcibly "took the cheſts, which the defendant had en- "gaged to carry;" and, though the maſter was

* 2 Bulſtr. 280. 2. Ro. Abr. 567.

entirely blameleſs, yet ſir MATTHEW HALE and his brethren, having heard both civilians and common-lawyers, and, among them, Mr. HOLT for the plaintiff, determined, on the principles juſt before eſtabliſhed, that the bailor ought to recover*. This caſe was frequently mentioned afterwards by lord HOLT, who ſaid, that "the "declaration was drawn by the greateſt pleader "in *England* of his time†."

Still farther: ſince neither the *element*, on which goods are carried, nor the *magnitude* and *form* of the carriage, make any difference in the reſponſibility of the bailee, one would hardly have conceived, that a diverſity could have been taken between a *letter* and any other thing. Our *common* law, indeed, was acquainted with no ſuch diverſity; and a *private* poſt-maſter was preciſely in the ſituation of another carrier; but the ſtatute of CHARLES II. having eſtabliſhed a *general* poſt-office, and taken away the liberty of ſending letters by a *private* poſt‡, it was thought, that an alteration was made in the obligation of the poſt-maſter *general*; and, in the caſe of *Lane* and *Cotton*, three judges determined, againſt the fixed and well-ſupported opinion of chief juſtice HOLT, "that the poſt-maſter was *not*

* 1 Ventr. 190. 238. Raym. 220.

† Ld. Raym. 920.

‡ 12 Cha. II. ch. 35. See the ſubſequent ſtatutes.

" anſwerable for the loſs of a letter with exche-
" quer-bills in it* :" now this was a caſe of *ordinary* neglect, for the bills were *ſtolen* out of the plaintiff's letter *in the defendant's office*† ; and, as the maſter has a great *ſalary* for the diſcharge of his truſt; as he ought clearly to anſwer for the acts of his clerks and agents; as the ſtatute, profeſſedly enacted for *ſafety* as well as *diſpatch*, could not have been intended to deprive the ſubject of any benefit, which he before enjoyed; for theſe reaſons, and for many others, I believe that CICERO would have ſaid, what he wrote on a ſimilar occaſion to TREBATIUS, " Ego tamen
" SCÆVOLÆ aſſentior‡." It would, perhaps, have been different *under the ſtatute*, if the poſt had been *robbed*, either by day or by *night*,

* Carth. 487. 12 Mod. 482.

† In addition to the authorities, before cited, p. 370. note (†), for the diſtinction between a loſs by *ſtealth* and by *robbery*, ſee *Dumoulin*, tract. *De eo quod intereſt*, note 184. and ROSELLA CASUUM, 28. b. This laſt is the book, which *St. German* improperly calls *Summa Roſella*, and by miſquoting which he miſled me in the paſſage concerning *the fall of a houſe*, p. 396. The words of the author, *Trovamala*, are theſe: " Domus tua *minabatur ruinam*; domus corruit, et in-
" terficit equum tibi *commodatum*; certè non poteſt dici caſus for-
" tuitus; quia *diligentiſſimus* reparâſſet domum, vel ibi non ha-
" bitâſſet; ſi autem domus *non* minabatur ruinam, ſed *impetu*
" *tempeſtatis* validæ corruit, non eſt tibi imputandum."

‡ Epiſt. ad Fam. VII. 22.

when there is a neceſſity of travelling, but even that queſtion would have been diſputable; and here I may conclude this diviſion of my eſſay, with obſerving, in the plain but emphatical language of St. GERMAN, "that all the *former* diverſities be "granted by ſecondary concluſions derived upon "the law of reaſon, *without any ſtatute made in* "*that behalf*; and, peradventure, laws and the "concluſions therein be the more plain and the "more open; for *if any ſtatute were made there-* "*in*, I think verily, more doubts and queſtions "would ariſe *upon the ſtatute*, than doth now, "when they be only argued and judged after "the *common* law*."

Before I finiſh the *hiſtorical* part of my eſſay, in which I undertook to demonſtrate, "that a "perfect harmony ſubſiſted on the intereſting "branch of juriſprudence in the codes of nations "*moſt eminent for legal wiſdom*†," I cannot forbear adding a few remarks on the inſtitutions of thoſe nations, who are generally called *barbarous*, and who ſeem in many inſtances to have deſerved that epithet: although traces of ſound reaſoning and ſolid judgement appear in moſt of their ordinances.

By the ancient laws of the WISIGOTHS, which are indeed rather obſcure, the "keeper of

* Doct. *and* Stud. *dial.* 2. *chap.* 38. laſt ſentence.

† P. 335.

" a horſe or an ox for *hire*, as well as a *hirer for* " *uſe*, was obliged, if the animal *periſhed*, to re- " turn another of equal worth:" the law of the *Baiuvarians* on this head is nearly in the ſame words; and the rule is adopted with little alteration in the capitularies of CHARLEMAGNE and LEWIS *the Pious**, where the *Moſaick* law before cited concerning a *borrower* may alſo be found†. In all theſe codes a *depoſitary* of gold, ſilver, or valuable trinkets, is made chargeable, if they are deſtroyed by *fire*, and *his own* goods periſh *not* with them; a circumſtance, which ſome other legiſlators have conſidered as *concluſive* evidence of groſs neglect or fraud: thus, by the old *Britiſh* tract, called the book of CYNAWG, a perſon, who had been *robbed* of a depoſit, was allowed to clear himſelf by making oath, with compurgators, that he had no concern in the robbery, *unleſs he had ſaved his own goods*; and it was the ſame, I believe, among the *Britons* in the caſe of a loſs by *fire*, which happened without the fault of the bailee; although HOWEL *the Good* ſeems to have been rigorous in this caſe, for the ſake of publick ſecurity‡. There was

* Lindenbrog, LL. *Wiſigoth.* lib. 5. tit. 5. § 1, 2, 3. and LL. *Baiuvar.* tit. 14. § 1, 2, 3, 4. *Capitul.* lib. 5. § 204.

† *Capitul.* lib. 6. § 22. Exod. xxii. 14, 15.

‡ LL. *Hywel Dda*, lib. 3. cap. 4. § 22. and lib. 3. cap. 3. § 40. See alſo *Stiernh.* De Jur. Sveon. p. 256, 257.

one regulation in the *northern* code, which I have not ſeen in that of any other nation: if precious things were depoſited and *ſtolen*, time was given to ſearch for the thief, and, if he could not be found within the time limited, a *moiety* of the value was to be paid by the depoſitary to the owner, "ut damnum ex medio uterque "ſuſtineret*."

Now I can ſcarce perſuade myſelf, that the phraſe uſed in theſe laws, *ſi id perierit*, extends to a periſhing by *inevitable accident*; nor can I think, that the old *Gothick* law, cited by STIERNHOOK, fully proves his aſſertion, that "a de-"poſitary was reſponſible for *irreſiſtible force*;" but I obſerve, that the military law-givers of the north, who entertained very high notions of good faith and honour, were more ſtrict than the *Romans* in the duties, by which depoſitaries and other truſtees were bound: an exact conformity could hardly be expected between the ordinances of poliſhed ſtates, and thoſe of a people, who could ſuffer diſputes concerning bailments to be decided by *combat*; for it was the Emperor FREDERICK II., who aboliſhed the trial by battle in caſes of conteſted depoſits, and ſubſtituted a more rational mode of proof†.

* LL. *Wiſigoth.* lib. 5. tit. 5. § 3.

† LL. *Longobard.* lib. 2. tit. 55. § 35. *Conſtit. Neapol.* lib. 2. tit. 34.

I purpoſely reſerved to the laſt the mention of the HINDU, or *Indian* code, which the learning and induſtry of my much-eſteemed friend Mr. HALHED has made acceſſible to *Europeans*, and the PERSIAN tranſlation of which I have had the pleaſure of ſeeing: theſe laws, which muſt *in all times* be a ſingular object of curioſity, are *now* of infinite importance; ſince the happineſs of millions, whom a ſeries of amazing events has ſubjected to a *Britiſh* power, depends on a ſtrict obſervance of them.

It is pleaſing to remark the ſimilarity, or rather identity, of thoſe concluſions, which pure unbiaſſed reaſon in all ages and nations ſeldom fails to draw, in ſuch juridical inquiries as are not fettered and manacled by *poſitive* inſtitution; and, although the rules of the *Pundits* concerning *ſucceſſion* to *property*, the *puniſhment* of *offences*, and the *ceremonies* of *religion*, are widely different from ours, yet, in the great ſyſtem of *contracts* and the common intercourſe between man and man, the POOTEE of the *Indians* and the DIGEST of the *Romans* are by no means diſſimilar*.

* "Hæc omnia, ſays GROTIUS, *Romanis* quidem con-
"gruunt legibus, ſed non ex illis primitùs, ſed ex *æquitate na-*
"*turali*, veniunt: quare eadem apud alias quoque gentes
"reperire eſt." De Jure *Belli* ac *Pacis*, lib. 2. cap. 12. § 13.

Thus, it is ordained by the ſages of *Hinduſtán*, that "a depoſitor ſhall carefully inquire into "the character of his intended depoſitary; who, "if he undertake to keep the goods, ſhall pre-"ſerve them with *care* and *attention*; but ſhall "not be bound to reſtore the value of them, if "they be *ſpoiled by unforeſeen accident*, or *burned*, "or *ſtolen*; UNLESS he *conceal* any part of them, "that has been ſaved, or unleſs *his own effects* "*be ſecured*, or unleſs the accident happen after "his *refuſal* to redeliver the goods on a de-"mand made by the depoſitor, or while the de-"poſitary, againſt the nature of the truſt, pre-"ſumes to *make uſe* of them:" in other words, "the bailee is made anſwerable for *fraud*, or "for *ſuch negligence* as approaches to it*.

So, a *borrower* is declared to be chargeable even for *caſualty* or *violence*, if he fail to return the thing after the completion of the buſineſs, for which he borrowed it; but not, if it be *accidentally* loſt or *forcibly* ſeized, *before* the expiration of the time, or the concluſion of the affair, for which it was lent†: in another place, it is provided, that, if a *pledge* be damaged or loſt by *unforeſeen accident*, the creditor ſhall nevertheleſs recover his debt with intereſt, but the

* *Gentoo* Laws, chap. IV. See before, p. 373.

† Same chapter. See before, p. 397.

debtor ſhall not be entitled to the value of his pawn*; and that, if the pledgee *uſe* the thing pledged, he ſhall pay the value of it to the pledgor in caſe of its loſs or damage, whilſt he uſes it†.

In the ſame manner, if a perſon *hire* a thing *for uſe*, or if any *metal* be delivered to a *workman*, for the purpoſe of making veſſels or ornaments, the bailees are holden to be diſcharged, if the thing bailed be deſtroyed or ſpoiled by *natural* misfortune or the injuſtice of the *ruling power*, UNLESS it be kept *after the time* limited for the return of the goods, or the performance of the work‡.

All theſe proviſions are conſonant to the principles eſtabliſhed in this eſſay; and I cannot help thinking, that a clear and conciſe treatiſe, written in the *Perſian* or *Arabian* language, on the law of *Contracts*, and evincing the general conformity between the *Aſiatick* and *European* ſyſtems, would contribute, as much as any regulation whatever, to bring our *Engliſh* law into good odour among thoſe, whoſe fate it is to be under our dominion, and whoſe happineſs ought to be a ſerious and continual object of our care.

* Chap. I. Sect. I. Before, p. 415. 416.

† Chap. I. Sect. II. Before, p. 409.

‡ Chap. IV. and Chap. X. Before, p. 418, 421.

Thus have I proved, agreeably to my undertaking, that *the plain elements of natural law*, on the ſubject of BAILMENTS, *which have been traced by a ſhort analyſis*, are recogniſed and confirmed by the wiſdom of nations*; and I haſten to the third, or *ſynthetical*, part of my work, in which, from the nature of it, moſt of the *definitions* and *rules*, already given, muſt be repeated with little variation in *form*, and none in *ſubſtance:* it was at firſt my deſign, to ſubjoin, with a few alterations, the *Synopſis* of DELRIO; but finding, that, as BYNKERSHOEK expreſſes himſelf with an honeſt pride, *I had leiſure ſometimes to write, but never to copy*, and thinking it unjuſt to embelliſh any production of mine with the inventions of another, I changed my plan; and ſhall barely recapitulate the doctrine expounded in the preceding pages, obſerving the method, which logicians call *Syntheſis*, and in which all ſciences ought to be explained.

I. To begin then with *definitions:* 1. BAILMENT *is a delivery of goods in truſt, on a contract expreſſed or implied, that the truſt ſhall be duly executed, and the goods redelivered, as ſoon as the time or uſe, for which they were bailed, ſhall have elapſed or be performed.*

2. DEPOSIT is a *bailment* of goods *to be kept for the bailor without a recompenſe.*

* Before, p. 328 and 337.

3. MANDATE is a *bailment* of goods, *without reward*, to be *carried from place to place*, or *to have ſome act performed about them.*

4. LENDING FOR USE is a *bailment of a thing* for a certain time *to be uſed* by the borrower *without paying for it.*

5. PLEDGING is a *bailment* of goods by a debtor to his creditor *to be kept till the debt be diſcharged.*

6. LETTING TO HIRE is 1. a *bailment* of A THING *to be uſed* by the hirer *for a compenſation in money*; or, 2. a *letting out* of WORK and LABOUR to be *done*, or CARE and ATTENTION to be *beſtowed*, by the bailee, *on the goods bailed*, and that for *a pecuniary recompenſe*; or, 3. of CARE and PAINS in *carrying the things delivered from one place to another for a ſtipulated or implied reward.*

7. INNOMINATE BAILMENTS are thoſe, where the *compenſation* for the *uſe* of a thing, or for *labour* and *attention*, is *not pecuniary*, but either 1. the *reciprocal uſe* or the *gift* of ſome *other* thing; or, 2. *work* and *pains*, *reciprocally* undertaken; or, 3. the *uſe* or *gift* of another thing in conſideration of *care* and *labour*, and converſely.

8. ORDINARY *neglect* is the *omiſſion* of that *care*, which *every man of common prudence, and*

capable of governing a family, takes of *his own* concerns.

9. GROSS *neglect* is the *want* of that care, which *every man of common ſenſe, how inattentive ſoever*, takes of *his own* property.

10. SLIGHT neglect is the *omiſſion* of that *diligence*, which *very circumſpect and thoughtful perſons* uſe in ſecuring *their own* goods and chattels.

11. A NAKED CONTRACT is a contract made without *conſideration* or *recompenſe*.

II. The *rules*, which may be conſidered as *axioms*, flowing from natural reaſon, good morals, and ſound policy, are theſe:

1. A bailee, who derives *no benefit* from his undertaking, is reſponſible only for GROSS neglect.

2. A bailee, who *alone* receives *benefit* from the bailment, is reſponſible for SLIGHT neglect.

3. When the bailment is *beneficial* to *both* parties, the bailee muſt anſwer for ORDINARY neglect.

4. A SPECIAL AGREEMENT of any bailee to anſwer for *more* or *leſs*, is in general valid.

5. ALL bailees are anſwerable for actual FRAUD, even *though the contrary be ſtipulated*.

6. No bailee ſhall be charged for a loſs by

inevitable ACCIDENT or *irreſiſtible* FORCE, except by *ſpecial agreement*.

7. ROBBERY by *force* is conſidered as *irreſiſtible*; but a loſs by *private* STEALTH is *preſumptive* evidence of *ordinary* neglect.

8. GROSS neglect is a *violation of good faith*.

9. No ACTION lies to compel performance of a *naked contract*.

10. A reparation may be obtained by ſuit for every DAMAGE occaſioned by an INJURY.

11. The negligence of a SERVANT, acting *by his maſter's expreſs or implied order*, is the negligence of the MASTER.

III. From theſe *rules* the following *propoſitions* are evidently deducible:

1. A DEPOSITARY is reſponſible only for GROSS neglect; or, in other words, for *a violation of good faith*.

2. A DEPOSITARY, whoſe character is known to his depoſitor, ſhall not anſwer for *mere neglect*, if he take *no better care of his own* goods, and *they alſo* be ſpoiled or deſtroyed.

3. A MANDATARY *to carry* is reſponſible only for GROSS neglect, or *a breach of good faith*.

4. A MANDATARY *to perform a work* is bound to uſe *a degree of diligence adequate to the performance of it*.

5. A man cannot be compelled by ACTION

to perform his promiſe of engaging in a DEPOSIT or a MANDATE.

6. A reparation may be obtained by ſuit for DAMAGE occaſioned by the *nonperformance* of a promiſe to become a DEPOSITARY or a MANDATARY.

7. A BORROWER FOR USE is reſponſible for SLIGHT negligence.

8. A PAWNEE is anſwerable for ORDINARY neglect.

9. The HIRER of a THING is anſwerable for ORDINARY neglect.

10. A WORKMAN for HIRE muſt anſwer for ORDINARY neglect of the goods bailed, and apply a *degree of* SKILL *equal to his undertaking*.

11. A LETTER to HIRE of his CARE and ATTENTION is reſponſible for ORDINARY negligence.

12. A CARRIER for HIRE, by *land* or by water, is anſwerable for ORDINARY neglect.

IV. To theſe *rules* and *propoſitions* there are ſome *exceptions*:

1. A man, who *ſpontaneouſly* and *officiouſly* engages to *keep*, or to *carry*, the goods of another, though *without reward*, muſt anſwer for SLIGHT neglect.

2. If a man, through *ſtrong perſuaſion* and with *reluctance*, undertake the execution of a

MANDATE, no more can be required of him than *a fair exertion of his ability.*

3. ALL bailees become reſponſible for loſſes by CASUALTY or VIOLENCE, *after* their *refuſal* to return the things bailed on a LAWFUL DEMAND.

4. A BORROWER and a HIRER are anſwerable in ALL EVENTS, if they *keep* the things borrowed or hired *after the ſtipulated time*, or *uſe* them *differently* from their agreement.

5. A DEPOSITARY and a PAWNEE are anſwerable in ALL EVENTS, if they *uſe* the things depoſited or pawned.

6. An INNKEEPER is chargeable for the goods of his gueſt *within his inn*, if the gueſt be *robbed* by the *ſervants* or *inmates* of the keeper.

7. A COMMON CARRIER, by *land* or by *water*, muſt indemnify the owner of the goods carried, if he be ROBBED of them.

V. It is *no* exception, but a *corollary*, from the *rules*, that "every bailee is reſponſible for a "loſs by ACCIDENT or FORCE, however *inevi-* "*table* or *irreſiſtible*, if it be *occaſioned* by that "*degree of negligence*, for which the nature of "his contract makes him generally anſwera- "ble;" and I may here conclude my diſcuſſion of this important title in juriſprudence with a general and obvious *remark*; that "*all* the pre-

" ceding rules and propoſitions may be diverſi-
" fied to *infinity* by the *circumſtances* of every
" particular caſe;" on which circumſtances it is on the *continent* the province of a *judge* appointed by the ſovereign, and in ENGLAND, to our conſtant honour and happineſs, of a *jury* freely choſen by the parties, *finally* to decide: thus, when a painted *cartoon*, paſted on canvas, had been *depoſited*, and the bailee kept it ſo near a damp wall, that it peeled and was much injured, the queſtion " whether the depoſitary
" had been guilty of GROSS neglect," was properly left to the jury, and, on a verdict for the plaintiff, with pretty large damages, the court refuſed to grant a new trial*; but it was the judge, who determined, that the defendant was by *law* reſponſible for *groſs* negligence *only*; and, if it had been proved, that the bailee had kept *his own* pictures *of the ſame ſort* in the ſame place and manner, and that *they too* had been ſpoiled, a new trial would, I conceive, have been granted; and ſo, if no more than SLIGHT neglect had been committed, and the jury had, nevertheleſs, taken upon themſelves to decide againſt law, that a bailee *without reward* was reſponſible for it.

Should the *method* uſed in this little tract be approved, I may poſſibly not want inclination,

* 2 Stra. 1099. *Mytton* and *Cock*.

if I do not want leiſure, to diſcuſs in the ſame form *every* branch of *Engliſh* law, *civil* and *criminal*, *private* and *publick*; after which it will be eaſy to ſeparate and mould into diſtinct works, the three principal diviſions, or the *analytical*, the *hiſtorical*, and the *ſynthetical*, parts.

The great ſyſtem of juriſprudence, like that of the Univerſe, conſiſts of many ſubordinate ſyſtems, all of which are connected by nice links and beautiful dependencies; and each of them, as I have fully perſuaded myſelf, is reducible to a few plain *elements*, either the wiſe *maxims* of national policy and general convenience, or the *poſitive* rules of our forefathers, which are ſeldom deficient in wiſdom or utility: if LAW *be* a *ſcience*, and really deſerve ſo ſublime a name, it muſt be founded on principle, and claim an exalted rank in the empire of *reaſon*; but, if it be *merely* an unconnected ſeries of decrees and ordinances, its uſe may remain, though its dignity be leſſened, and He will become the greateſt lawyer, who has the ſtrongeſt habitual, or artificial, *memory*. In practice, law certainly employs *two* of the mental faculties; *reaſon*, in the primary inveſtigation and deciſion of points *entirely new*; and *memory*, in tranſmitting to us the reaſon of ſage and learned men, to which our own ought invariably to

yield, if not from a becoming modeſty, at leaſt from a juſt attention to that object, for which all laws are framed, and all ſocieties inſtituted, THE GOOD OF MANKIND.

ADVERTISEMENT.

AFTER I had finiſhed the preceding tract, to the ſatisfaction of ſeveral friends, but not to my own, I was informed, that the learned CHRISTIAN THOMASIUS had publiſhed a diſſertation on the ſame ſubject with the following title: *De Uſu Practico Doctrinæ difficillimæ Juris Romani de Culparum Præſtatione in Contractibus*; HALÆ, MDCCV. The fame of the author, and the high applauſe, which the very ſenſible *Bynkerſhoek* beſtows on him, impreſſed me with a moſt favourable idea of his work, and with a ſtrong deſire to procure it; but, to my extreme diſappointment, I cannot find it in any library, publick or private, in the Metropolis or in either of our Univerſities: I have ſent for it, however, to *Germany*, and, when I receive it, ſhall take a ſincere pleaſure, either in correcting ſuch errors, as it may enable me to detect in my eſſay, or in confirming the ſyſtem, which I have adopted, by ſo reſpectable an authority.

THE CASES.

Amies and *Stevens*, - Page 438
Barcroft's Caſe, - - *ib.*
Banion's Caſe, - - 363
Calye's Caſe, - - 422
Coggs and *Bernard*, - - 386
Dale and *Hall*, - - 436
Gibbon and *Paynton*, - - 437
Caſe of *Graveſend* Barge, - - 438
Lane and *Cotton*, - - 440
Mors and *Slew*, - - 439
Moſley and *Foſſet*, - - 421
Mulgrave and *Ogden*, - - 361
Mytton and *Cock*, - - 454
Powtuary and *Walton*, - - 389
Ratcliff and *Davis*, - - 408
Rich and *Kneeland*, - - 437
Counteſs of *Shrewſbury's* Caſe, - 372
Southcote's Caſe, - - 368
Titchburne and *White*, - - 436
Vere and *Smith*, - - 429
Wheatly and *Low*, - - 378
Woodliefe and *Curties*, - - 434

AN INQUIRY

INTO

THE LEGAL MODE

OF

SUPPRESSING RIOTS,

WITH

A CONSTITUTIONAL PLAN

OF

FUTURE DEFENCE.

Res videas quo modo ſe habeant: orbem terrarum, imperiis diſtributis, ardere bello; urbem ſine legibus, ſine judiciis, ſine jure, ſine fide, relictam direptioni et incendiis.

CIC. Epiſt. ad Fam. 4. 1.

AN INQUIRY

INTO

THE LEGAL MODE

OF

SUPPRESSING RIOTS.

IT has long been my opinion, that, in times of national adverſity, thoſe citizens are entitled to the higheſt praiſe, who, by perſonal exertions and active valour, promote at their private hazard the general welfare; that the ſecond rank in the ſcale of honour is due to thoſe, who, in the great council of the nation, or in other aſſemblies, legally convened, propoſe and enforce with manly eloquence what they conceive to be ſalutary or expedient on the occaſion; and that the third place remains for thoſe perſons, who, when they have neither a neceſſity to act, nor a fair opportunity to ſpeak, impart in writing to their countrymen ſuch opinions as their reaſon approves, and ſuch knowlege as their painful reſearches have enabled them to acquire.

With theſe reſtrictions, the ſword, the tongue, and the pen, which have too often been employed by the worſt paſſions to the worſt purpoſes, may become the inſtruments of exalted virtue; inſtruments, which it is not the right only, but the duty, of every man to uſe, who can uſe them; paying always a ſacred regard to the laws of that country, which he undertakes to defend, to adviſe, or to enlighten.

A ſenſe of this duty and a conſciouſneſs of this right have impelled me, with no views, as it will be readily believed, of ambition or intereſt, much leſs from any factious motive, to take up that inſtrument, which I have ſtated as the leaſt honourable of the three, and to preſent the publick with a few conſiderations on a ſubject no leſs intereſting at the preſent hour than important to all future ages.

Having unhappily been a vigilant and indignant ſpectator of the late abominable enormities; having ſeen the ſenate beſieged, and the ſenators inſulted; the laws of our country defied, and the law of nations violated; having beheld the houſes of our trueſt patriots and moſt reſpectable magiſtrates either deſtroyed, aſſailed, or menaced; having paſſed a whole night encircled by the blazing habitations of unoffending individuals, and by the flames of thoſe edifices which publick juſtice had allotted to various claſſes of of-

fenders; having lamented over a great metropolis expoſed for many days to the fury of a licentious rabble; having believed the nobleſt commercial City in the world to be in danger of a ſecond conflagration; having in vain ſought acceſs to the courts at Weſtminſter in full term, and to the houſes of parliament in full ſeſſion; having, in a word, been witneſs to horrors, all the concurrent cauſes of which are not eaſy to be known, and all the conſequences of which are leſs eaſy to be predicted; I could not but ſee at length, with a mixed ſenſation, between anguiſh and joy, the vigorous and triumphant exertions of the executive power; and I admitted the neceſſity of thoſe exertions, whilſt I deplored it.

Every well-diſpoſed man, and lover of tranquillity, muſt have rejoiced, that, on the ninth of June, the peaceable and terrified inhabitants of this noble Capital might enjoy repoſe; that the valuable effects, which many had removed, and ſome had even buried, might be replaced; that the artiſan might reſume his implements, and the ſtudent, his books; that juſtice had reaſcended her ſeat; and that order was ſucceeding to confuſion, harmony to diſcord; but every honeſt man and lover of his country muſt have grieved, that a whole week was then before us, in which the neceſſary adjournment of the Commons, who would otherwiſe have been deliberating on

the ſtate of the metropolis and the kingdom, had left us under a power, which, whatever it might be in form and in effect, was in truth and ſubſtance, dictatorial.

In this awful interval a queſtion occurred to me, which muſt naturally have preſented itſelf to many others: "Whether the ſtill-ſubſiſting "laws and genuine conſtitution of ENGLAND "had not armed the *civil ſtate* with a power "ſufficient, if it had been previouſly underſtood "and prepared, to have ſuppreſſed ever ſo for-"midable a riot without the intervention of the "*military*."

If no ſuch power legally exiſted in the ſtate, our ſyſtem, I thought, muſt be defective in a moſt eſſential point; ſince no people can be really and ſubſtantially free, whoſe freedom is ſo *precarious*, in the true ſenſe of the word, as to depend on the protection of the ſoldiery; and even our protectors, who for ſeveral days poſſibly could not, but certainly did not, act at all, might have been neceſſarily called away, in the moſt dangerous moment, to defend our coaſts and maritime towns: if, on the other hand, ſuch a power of ſelf-protection did exiſt, our laws, I concluded, muſt have been diſgracefully neglected, and ought to be reſtored to full vigour and energy.

A very ſhort inquiry enabled me to anſwer

the queſtion, at leaſt to my own ſatisfaction, *in the affirmative*; and it is the reſult of this inquiry, which I now requeſt the public to accept with the indulgence due to an occaſional production, and with the attention due to a ſubject of general importance.

This then is the propoſition, which I undertake to demonſtrate: "That the common, and "ſtatute, laws of the realm, in force at this day, "give the *civil* ſtate in every county a power, "which, if it were perfectly underſtood and "continually prepared, would effectually quell "any riot or inſurrection, without aſſiſtance from "the *military*, and even without the modern "riot-act."

To this propoſition I ſhall ſtrictly, and, as far as I am able, logically confine myſelf; avoiding all parade of legal or antiquarian learning, and omitting all ſuch diſquiſitions as might anſwer the purpoſe of oſtentation, which I diſdain, but not of utility, which alone I ſeek: ſhould the curious and intelligent reader be deſirous of inveſtigating the powers of magiſtrates and of courts in recording riots and puniſhing rioters, and of tracing the hiſtory of our ancient and modern laws for the preſervation of publick tranquillity, from that of king INA to that of GEORGE the Firſt, he will receive ample information from the various books of authority, which I ſhall

have occaſion to cite in the courſe of my argument.

It is in every one's mouth, that, on all violent breaches of the peace, the ſheriff of the county is not only authorized but commanded to raiſe the *Poſſe Comitatûs*, and forcibly to ſuppreſs the tumult; but, if moſt of thoſe, who uſe this expreſſion, will examine their own minds, they will preſently perceive, that they utter words, which convey to them no diſtinct idea, and that the *power of the county*, like many other *powers* in nature and juriſprudence, is very ill aſcertained, and very imperfectly comprehended. Logicians give us an admirable rule, "*that we ſhould ſeek* "*after a clear, preciſe and complete conception of* "*things, as they really exiſt in their own nature* "*and in all their parts, and ſhould not always* "*imagine that there are ideas, becauſe there are* "*words**:" let us apply this rule to the caſe before us, and endeavour to form a luminous, fixed, comprehenſive notion of the *power* in queſtion; without ſuppoſing that we comprehend it, merely becauſe we know, that, beſides its *Latin* name, it is called in Norman French, *Poiar del Countee*, and ſometimes, *Aide del pais*†.

We cannot begin our inveſtigation under a

* Watts, part I. chap. vi. † Crompt. 124.

more certain or more reſpectable guide, than Chief Juſtice FINEUX, whoſe words I ſhall tranſcribe from that moſt venerable repoſitory of genuine *Engliſh* wiſdom, the Year books*: "At the beginning," ſays that learned Judge, "all the adminiſtration of juſtice was in one "hand, namely, in the Crown; then, after the "multiplication of the people, that adminiſtra-"tion was diſtributed into counties, and the "*power* was committed to a deputy in each "county, namely, the Viſcount, or Sheriff; who "was the King's deputy to preſerve the peace; "and thus it is, that all people muſt, in obe-"dience to him, be *ready* in defence of the "realm, when enemies come: this too was he "aſſigned to be a conſervator of the peace, to "puniſh malefactors, to defend the realm when "enemies invade it, to be attendant on the King "in war-time, and to cauſe all people in his "county to go with the King to defend the "land againſt enemies."

Who the people are, that the laws of England required, and ſtill require, to be *ready* and obedient to the ſheriff on all occaſions of publick diſturbance, we learn from the judicious antiquary, LAMBARD, who cites and adopts the opinion of Mr. *Marrow* delivered in a work,

* 12. Hen. VII. 17.

which I ſuppoſe to have been a reading on the ſtatute 13 Hen. IV. His opinion was, "that the "juſtices of the peace, ſheriff or under ſheriff, "ought to have the aid and aſſiſtance of all "knights, gentlemen, yeomen, labourers, ſer-"vants, apprentices, and likewiſe of wards, and "of other young men above the age of fifteen "years; becauſe all of that age are bound to "have *harneſs*, or armour, by the ſtatute of "Wincheſter*.".

What effect the ſubſequent repeal of the ſtatutes of armour might have on the reaſon aſſigned by Mr. *Marrow* for his opinion, it is needleſs to inquire; for it ſeems obvious, that the ſtatutes of JAMES I. removed the *neceſſity* only, and not the *propriety*, of having arms, or, to uſe the very words of the old act, *armure pur la pees garder*; and the doctrine in *Lambard* is generally underſtood to be law†. The paſſage above-cited appears, however, to have miſled the great commentator on the laws of England, who ſeems to have collected from it, that none were bound to obey the ſummons of the ſheriff, but perſons *under the degree of nobility*‡; whereas the patent of aſſiſtance, cited by *Dalton*‖, commands barons, earls, and dukes, to be *auxiliantes et re-*

* Lamb. Eiren. 316.
† Dalt. c. 95.
‡ 1 Comm. 344. 4 Comm. 122.
‖ C. 1.

ſpondentes to the ſheriff in all things belonging to his office.

The power of the county, therefore, includes the whole *civil* ſtate, from the duke to the peaſant; while the *military* ſtate, *as ſuch*, forms no part of that power, being under a different command, and ſubject to a different law; but, as every ſoldier in England is at the ſame time a citizen, he is authorized and perhaps bound, when under no particular orders or at no particular ſtation, to exert himſelf, like any other good ſubject, in the ſuppreſſion of tumults, the prevention of felony, and the apprehenſion of the rioters or felons. This I mean: when the ſoldiery, not being upon military duty, happen to be preſent at a riot, and in their civil capacity forcibly ſuppreſs it, their act is not only legal but laudable; and the colour of their clothes, or the nature of their arms, make no kind of difference; but, when they are *in truth* called out by the executive magiſtrate, and are *in fact* no more than inſtruments in the hands of their commanders, their acts can only be juſtified by that NECESSITY which always *defends what it compels*, which for the time ſuperſedes all poſitive law, but of the real exiſtence of which their country muſt afterwards judge, unleſs the legiſlature ſhould, in their wiſdom, be pleaſed to declare it: For this diſtinction I can produce no written au-

thority; but it ſeems conſonant to reaſon as well as truth.

This power of the county, of which we may now begin to form a diſtinct idea, is mentioned, as well known and well underſtood, in a variety of ſtatutes, which were confirmatory of the common law; and ſome parts of which I ſhall cite in the original languages, how barbarous or inelegant ſoever they may appear to a claſſical eye.

The ſtat. Weſtm. 1. c. 17. ordains "qe le viſ- "counte ou le bailiff, priſe ove luy *poyer de ſon* "*countee*, ou de ſa baille, voit eſſayer de faire le "plevin des averes a celuy qe prit les averes." And that of Weſtm. 2. c. 39. is more peremptory in caſes of reſiſtance to the execution of civil proceſs: "Multoties etiam dant reſponſum, "quod non potuerunt proſequi præceptum regis "propter reſiſtentiam poteſtatis alicujus magna- "tis, de quo caveant vicecomites de cætero, quia "hujuſmodi reſponſio multum redundat in de- "decus domini regis; et, quam citò ballivi ſui "teſtificantur, quòd invenerunt hujuſmodi re- "ſiſtentiam, ſtatim omnibus omiſſis, aſſumpto "ſecum *poſſe comitatûs* ſui, eant in propriâ per- "ſonâ ad faciendam executionem." By the 17 Rich. II. c. 8. it is enacted, that, in caſe of any tumult or diſorder, "a pluis toſt qe viſcontz "et autres miniſtres le roi poent ent avoir

" coniſſance, ove *la force del countee et pais*, ou " tiel cas aviegne, ilz mettent deſtourbance en- " contre tiel malice *ove tout lour poair*, et " preignent tielx meſleſours, et les mettent en " priſone tanqe due execution de leie ſoit fait " de eux, et qe touz ſeignurs et autres liges du " roialme ſoient entendantz et aidantz, *de tout* " *lour force et poair*, as viſcontz et miniſtres avant " ditz."

Again: by the 13 Hen. IV. c. 7. " Ordeig- " nez eſt et eſtabliz, qe, ſi aucun riot aſſemblee " ou rout des gentz encontre la loie ſe face en " aucune partie del roialme, les juſtices de paix, " trois ou deux de eux a meyns, et le viſcont " ou ſouth viſcont del countee, ou tiel riot aſſem- " blee ou rout ſe ferra enapres, *veignent ove le* " *poair del countee*, ſi beſoigne ſerra, pur eux " areſter, et eux areſtent." In the conſtruction of this laſt ſtatute it has been holden*, that, although it ſpeak of *three* or *two* juſtices at leaſt, yet *one* juſtice may raiſe the power and ſuppreſs a riot; for *it is a beneficial law*, ſaid FINEUX, *and was enacted for the prevention of miſchief, which might enſue, if a juſtice were to wait for others.* It has alſo been adjudged, that, under the word *miniſters*, in the ſtat. 17 Rich. II. c. 8. juſtices of peace are compriſed †; and ſo are *conſtables*,

* 14 Hen. VII. 10. Crompt. 46. b. † Crompt. 46. a.

by the opinion of *Fitzherbert* cited by *Crompton*, and confirmed by the Year book 1 Hen. VII. 10; where it is laid down, that "conſtabularii "villæ ſuper affraiam poſſunt levare populum."

We may therefore conclude, that, in all caſes of tumult and inſurrection, the ſheriff, or other *miniſter*, may and ought to make *proclamation*, commanding all ſuch perſons, as conſtitute the power of the county, to aſſemble and aſſiſt him*; or he may ſend a particular *warning* or *ſummons*, for the ſame purpoſe, to every individual of the *poſſe*, who muſt attend ſuch ſummons under pain of a heavy fine and impriſonment; for, by the ſtat. 2 Hen. V. c. 8. it is provided, "qe "les lieges du roi eſteantz ſufficeantz pur tra- "vailler en le countee, où tielx routes aſſemblez "ou riotes ſont, ſoient aſſiſtantz as juſtices, com- "miſſioners, viſcont, et ſoutz-viſcont, de meſme "le countee, *qant ilz ſerront reaſonablement* "*garniz*, pur chivacher, ove les ditz juſtices, "commiſſioners, et viſcont ou ſoutz-viſcont en "aide de reſiſtence de tielx riotes routes et aſ- "ſemblez ſur peine dempriſonement et faire fyn "et ranceon al roi:" And the offence of neglecting to join the power of the county, after ſuch reaſonable warning, is ranked by Sir *William*

* Dalt. c. 95.

Blackſtone under the claſs of *contempts againſt the king's prerogative**.

Having fixed our ideas concerning the nature of this legal power, the mode of raiſing it, and the puniſhment of a criminal neglect to join it, let us conſider, firſt, by the help of reaſon only, what corollaries neceſſarily follow the doctrine, which we have expounded; and, next, inquire whether authority and reaſon, which lord *Coke* juſtly calls *the two faithful witneſſes in matter of law*†, coincide on the queſtion before us; as they indubitably will, unleſs either our previous ratiocination be illogical, or the minds of ancient and modern lawyers have taken a bent from the prejudices of their reſpective ages.

From the obligation of the ſheriff, or other miniſter, to aſſemble the power of his county for the ſuppreſſion of any rebellion, inſurrection, riot, or affray, and for the repelling of invading enemies; from the duty incumbent on every man of ſufficient years and ſtrength to aſſociate himſelf with the power ſo aſſembled, and from the principles of natural juſtice, which will neither *require men to do impoſſible things*, nor *refuſe them the means of performing what they are commanded to perform*; from theſe obligations and theſe principles it inſtantaneouſly follows: Firſt;

* 4 Com. 122. † 1 Inſt. Pref.

That the ſheriff or other peace-officer is bound to raiſe *ſuch* a power as will effectually quell the tumult either really exiſting or juſtly feared.

Secondly; That the power ſo raiſed may and muſt be armed with ſuch *weapons*, and act in ſuch *order*, as ſhall enable them totally to ſuppreſs the riot or inſurrection, or to repel the invaders.

Thirdly; That, in the uſe of ſuch weapons, the power may juſtify the *charging*, *wounding*, or even *killing*, the rioters or inſurgents, who perſiſt in their outrages, and refuſe to ſurrender themſelves.

Fourthly; That the power of every county ought at all times, but eſpecially in times of danger, to be *prepared* for attending the magiſtrate, and to know the *uſe* of ſuch weapons, as are beſt adapted to the ſuppreſſion of tumults.

Fifthly; That, ſince the *muſket* and *bayonet* are found by experience to be the moſt effectual arms, all perſons, who conſtitute the power of a county, are bound to be competently ſkilled in the uſe of them.

Sixthly; That, ſince the only ſafe and certain mode of uſing them with effect is by acting *in a body*, it is the duty of the whole civil ſtate to know the platoon-exerciſe, and to learn it in companies.

As *no authority*, according to CHARRON, *can ſtand without reaſon*, ſo we find, by conſtant experience, that no reaſon can ſurmount the paſſions and prejudices of men without the aid of authority; and I am happy in believing, that both of them perfectly coincide in ſupport of the foregoing propoſitions: firſt, therefore, I ſhall prove them by citing caſes, which have been ſolemnly adjudged, together with the opinions of learned lawyers, whoſe works are much reſpected in our courts of juſtice; and, next, I ſhall inquire, whether thoſe caſes and opinions have been over-ruled or ſhaken by any ſubſequent deciſions, or acts of the legiſlature.

The earlieſt reſolution upon the ſubject, that has occurred to me, was in a caſe, which the very learned and judicious *Brook* thought *worthy of note** in his time, and which, in the preſent time, deſerves peculiar attention. It is reported in *French* in the firſt page of the Year book 3 Hen. VII. and it is manifeſtly the ſame with that afterwards abridged in an imperfect *Latin* note printed, out of its place, in the tenth page of the ſame book; though *Brook* ſeems to have conſidered them as different, or rather not to have obſerved their identity; for, in the title of his Abridgement juſt alluded to, he gives them

* Bro. Abr. *tit.* Office et Officer. 23.

in ſeparate articles, without melting both parts of the Year book together, as I propoſe to do; by which means I ſhall extract the whole caſe and form one conſiſtent ſtate of it.

JOHN DEINS had been outlawed in the county of *Suffolk* for felony; and, having brought a writ of error to reverſe the outlawry, had obtained a *Non Moleſtando*, which he delivered to the eſcheator, *John Lenthorp*; who, nevertheleſs, ſeiſed and took away his effects. Upon this, Deins replevied; and EDMUND BEDINGFIELD, the ſheriff, iſſued his precept to Thomas Gire, his bailiff, *jurus et conus*, together with *Roger Hopton*, *Edmund Heningham*, and three other perſons, directing them to take the goods of the plaintiff out of the eſcheator's poſſeſſion: accordingly, the bailiff and his party took forcibly from *Lenthorp* an hundred ſheep, which they delivered to *Deins*; and, in order to make delivery of the goods and cattle which remained, they aſſembled all the inhabitants of five adjacent vills; who, in number *three hundred, arrayed in a warlike manner, and armed with brigandines, jackets of mail, and* GUNS, *united and aſſociated themſelves, and marched** to the place where the cattle were detained; but did not proceed to any other act of violence.

* *Modo guerrino arraiati ſe univerunt et aſſociaverunt, et iter ſuum arripuerunt*, 3 Hen. VII. 1. 10.

For this imagined breach of the peace, and military array, an indictment was preferred in the King's Bench againſt the plaintiff in replevin, the ſheriff and his bailiff, and the perſons who had aſſiſted them; but the court unanimouſly adjudged, that the indictment was void; founding their judgement, as it ſeems, on the reaſons advanced by ſerjeant *Keble*, whoſe argument it may be proper to ſtate at large.

" As to the plaintiff in replevin, ſaid he, no " wrong was committed by him; for the eſchea- " tor, when he took the goods, after the *Non* " *Moleſtando* had been delivered to him, acted " unlike an officer; ſince it was his duty, in that " inſtant, to furceaſe his proceſs: *Dein*s, there- " fore, was perfectly juſtified in complaining to " the ſheriff, and muſt conſequently be diſ- " charged from this indictment.

" Nor did the ſheriff tranſgreſs his duty in exe- " cuting the replevin; for, when the party came " to him, he could not know, whether he was an " outlaw or not; or whether or no the eſcheator " had ſeiſed the cattle in the King's right; which " ought to have been ſhown by the King's offi- " cer. The bailiff too muſt be diſcharged; for " the ſervant is in the ſame condition with the " maſter; and, as the ſheriff cannot do every " thing himſelf, his deputy muſt have the ſame " power with him.

" In regard to his aſſembling three hundred " men, *that was no illegal act**; for every man is " bound to aſſiſt the ſheriff and his bailiff; to " ſupport him in executing the King's writs; " and to give him aid in all caſes of need; *and* " *this by common law and common reaſon*, not- " withſtanding the ſtatutes of Weſtminſter the " firſt and ſecond. So, if *any man* refuſe to aſ- " ſiſt the ſheriff at his *requeſt*, he ſhall be fined, " whether it be to execute proceſs, or to appre- " hend felons."

The Court agreed, that the bailiff had as good a right to raiſe the power as the ſheriff himſelf; becauſe it is all one office and one authority.

It was urged, "that, if men aſſemble with " arms and *do nothing*, it ſhall be intended, that " they aſſembled with a bad deſign;" but it was anſwered, that in ſome caſes the preſumption might be juſt; in others, not: thus the uſe of armour on particular occaſions, as on Midſummer eve in London, and at other times for ſport, is not puniſhable; and, here, the cauſe of the aſſembly appears, *namely to execute a replevin.* Even if they had acted, yet their aſſembly was lawful in the beginning; and ſuch aſſemblies are not illegal as are not *to the terror of the people of*

* *Ceo neſt incontre la ley:* So *Brook* reports his words, *tit.* Riots, 2.

our lord the king; which words ought to be in every indictment for an unlawful aſſembly.

Another point was touched upon by the king's ſerjeants: "that the ſheriff cannot take with "him *ſo many* armed men, but only a *reaſonable* "party;" to which it was anſwered, that, if he were ſo reſtrained, he might be in great jeopardy and peril of his life; and for this reaſon, *he may take as many as he pleaſes at his own diſcretion.*

Laſtly, it was argued on the ſtatute of Weſtm. 2. c. 39*, that the ſheriff might raiſe the power of his county *after complaint made*, and *not before*; but the judges held, that he might raiſe it before *by the common law.*

This caſe (which, for convenience in citation, I ſhall call *Bedingfield's* Caſe), is irreſiſtibly ſtrong in ſupport of my *firſt* and *ſecond* corollaries; for, although there ſeems to have been ſome doubt at firſt in the minds of the judges, as it was merely the execution *of civil proceſs*, yet, if the armed men had marched in array for the purpoſe of *apprehending felons*, there would have been no debate on the legality of the act; and, after an argument at the bar, the former doubt was entirely removed.

* The ſtatute of *Marlbridge*, c. 21. ſeems here to be meant; the words *poſt querimoniam factam* not being uſed in ſtat. Weſtm. 2.

The next is the caſe of a riot at *Drayton Baſſet* in *Staffordſhire*, determined in the Star-chamber in the twenty-fourth of Elizabeth, and cited more than once by *Crompton**; who ſays that the court reſolved, 1. That, if the two juſtices, neareſt to the place where the riot is committed, do not act as they are required by ſtat. 13 Hen. IV. c. 17. each of them ſhall pay an *hundred* pounds; and the other juſtices of the ſame county, where the tumult was, ſhall be fined for not ſuppreſſing it, *if there was any default in them.* 2. That the ſheriff and juſtices of peace may take as many men in armour as are neceſſary, WITH GUNS, and ſo forth, and *kill the rioters*, if they will not yield themſelves; for the ſtat. 13 Hen. IV. c. 17. ſays, that they MUST *arreſt them*; and, if the juſtices, or any of their company, kill any of the rioters, who will not ſurrender themſelves, it is no offence in them.

This caſe of *Drayton Baſſet*, which is alſo cited and approved by *Sir Matthew Hale*†, inconteſtably demonſtrates my *third* corollary.

In the 34th or 43d of Elizabeth (for the date is differently reported by ſome tranſpoſition of the figures) the doctrine in *Bedingfield's* caſe

* Crompt. 46. b. 124. b. † 1 H. P. C. 495.

was fully recognized and eſtabliſhed by the deciſion in the caſe of *St. John**, or *Gardener*†; which, being ſubſequent to the ſtat. 33 Hen. VIII. c. 6. prohibiting the uſe of *hand-guns*, clearly ſhows, that no alteration in the ancient law was made by that prohibition.

The caſe was this: *Gardener* had obtained a judgement againſt *St. John*, and procured a writ of execution directed to the ſheriff of *Bedford*, who made a warrant to *Gardener's* own brother as a ſpecial bailiff; but, reſiſtance being juſtly feared, the bailiff armed himſelf with a *dagge*, or ſhort gun. It happened that *St. John* was a juſtice of peace for *Bedfordſhire*, and ſeems to have had that *little learning*, which, in law rather more than in poetry, *is a dangerous thing*, eſpecially when it is coupled with knavery; for, having notice how the bailiff was armed, he contrived to have him ſeiſed by his ſervants, and brought before himſelf as the *next* juſtice; when, by colour of his office and the ſtatute of Henry VIII. he committed the officer, who came to arreſt him, until he ſhould pay ten pounds, one moiety to the queen, and another to the informant. The bailiff having removed himſelf by *habeas corpus*, and the whole matter being diſcloſed to the court, it was reſolved, "that the ſheriff or any of his mi-

* 5. Rep. 71. 72. † Cro. Eliz. 821, 822.

" niſters, in execution of juſtice, may carry " *dagges* or *hand-guns*, or other weapons inva- " ſive or defenſive, the ſame not being reſtrained " by the general prohibition of the ſtatute; for, " if it were, *no juſtice would be adminiſtered.*"

By ſtronger reaſon ſuch weapons may be carried for the purpoſe of ſuppreſſing riots, apprehending felons, or repelling invaders. It may here be obſerved, that the ſtatute of Hen. VIII. was enacted for the prevention of miſchief, that might be occaſioned by the uſe of *little hand-guns*, which might be carried ſecretly and kill on a ſudden; but guns of a proper length were not prohibited.

The *Caſe of Arms*, or BURTON's caſe, next preſents itſelf to our examination: it is of very high authority, and ſo appoſite to the object of our inquiry, that I ſhall make no apology for citing it in the very words of the learned reporter*: " Upon an aſſembly of *all the juſtices* " *and barons* at Serjeant's Inn this Eaſter term " (39 Eliz.), on Monday the 15th of April, this " queſtion was moved by *Anderſon*, Chief Juſ- " tice of the Common Bench; *Whether men may* " *arm themſelves to ſuppreſs riots and rebellions,* " *or to reſiſt enemies, and endeavour of themſelves* " *to ſuppreſs or reſiſt ſuch diſturbers of the peace* " *and quiet of the realm*; and, upon good deli-

* Poph. 121, 122.

" beration, it was reſolved *by them all*, that every " juſtice of peace, ſheriff, and other miniſter, or " OTHER SUBJECT OF THE KING, where ſuch " accident happens, *may do it*; and, to fortify " this their reſolution, they peruſed the ſtatute of " *Northampton*, 2 Edw. III. c. 3. which enacts, " that *none be ſo hardy as to come before the king's* " *juſtices or other miniſters of the king in the ex-* " *ecution of their office with force and arms, nor to* " *bring force in affray of the peace, or to ride or go* " *armed by night or day*, EXCEPT *the ſervants of* " *the king in his preſence, or the miniſters of the* " *king in the execution of his precepts, or of their* " *office, and thoſe who are in their company aſſiſt-* " *ing them*, OR UPON CRY MADE FOR WEA- " PONS TO KEEP THE PEACE, *and this in* " *places where accidents happen, upon the pe-* " *nalty in the ſame ſtatute contained*; where- " by it appeareth, that, *upon cry made for wea-* " *pons to keep the peace*, EVERY MAN, where " ſuch accidents happen, for breaking the peace, " *may by law arm himſelf* againſt ſuch evil-doers; " but they took it to be *the more diſcrete way* for " every one in ſuch a caſe to be aſſiſtant to the " juſtices, ſheriffs, or other miniſters of the king " in tbe doing of it."

Highly as the authority of Sir *John Popham* deſerves to be reſpected, it is to be wiſhed, that Lord *Anderſon* himſelf had given us a full account

" beat, wound, or kill, any of the opponents or " inſurgents, who ſhall reſiſt them*;" all which opinions are ſupported by ſolemn deciſions, and are, in truth, the concluſions of natural reaſon from the ſimpleſt and ſureſt premiſſes.

The *fifth* and *ſixth* propoſitions, which I conſider as ſimple corollaries, are founded in part on *extrinſick* aſſumptions, drawn from hiſtory and experience: they may therefore, even by the rules of law, admit of proof from the authority of men, " quibus in arte ſuâ credendum eſt;" and the following citation from Mr. WINDHAM's elegant introduction to his *Plan of Diſcipline for the Norfolk Militia* will be thought as convincing as any paſſage in Fitzherbert or Brook. " About the beginning of this century, " ſays he, the troops in Europe were univerſally " armed with firelocks; *to which*, much about " the ſame time, *the bayonet being added*, pikes " alſo were laid aſide. When the uſe of fire- " arms began to be generally eſtabliſhed, the *ne-* " *ceſſity of a great regularity and uniformity*, in " the manner of uſing thoſe arms, became appa- " rent: it was ſoon diſcovered, that thoſe troops, " which could make the briſkeſt fire, and ſuſtain " it longeſt, had a great ſuperiority over others " leſs expert; and, likewiſe, that *the efficacy and*

* Lamb. Eiren. 318. 1 Hale, H. P. C. 495.

I am aware, however, that *communialment* is the uſual reading; which will give a ſenſe rather leſs forcible, "that all men *generally* ſhall be "ready and accoutred *at* the ſummons of the "ſheriff;" but this amounts to the ſame thing; for how can a man be armed and apparelled *in an inſtant on a ſudden alarm*, unleſs his weapons and accoutrements were previouſly at hand?

The opinions of the learned, which form the ſecond branch of my proofs, can add little weight to *four* caſes of ſuch authority, as thoſe of *Bedingfield*, *Drayton Baſſet*, *St. John*, and the *Caſe of Arms:* indeed, theſe caſes ſeem to have been the guides of *Lambard* and *Dalton*, *Hale* and *Hawkins*; who all agree, that "it is referred to "the diſcretion of the ſheriff, under-ſheriff, or "other perſon authorized to raiſe the *poſſe*, how "many men they will aſſemble, and how they "ſhall be armed, weaponed, or otherwiſe furniſhed "for the buſineſs*;" that "private perſons may "arm themſelves in order to ſuppreſs a riot, and "that all, who attend the juſtices in order to "quell a tumult, may take with them *ſuch wea-* "*pons as ſhall enable them to do it effectually*†; "that, laſtly, in executing proceſs or apprehend- "ing rioters, they may, by the common law,

* Lamb. Eiren. 317. Dalt. c. 95. † 1 Hawk. P. C. c. 65.

" beat, wound, or kill, any of the opponents or " inſurgents, who ſhall reſiſt them*;" all which opinions are ſupported by ſolemn deciſions, and are, in truth, the concluſions of natural reaſon from the ſimpleſt and ſureſt premiſſes.

The *fifth* and *ſixth* propoſitions, which I conſider as ſimple corollaries, are founded in part on *extrinſick* aſſumptions, drawn from hiſtory and experience: they may therefore, even by the rules of law, admit of proof from the authority of men, " quibus in arte ſuâ credendum eſt;" and the following citation from Mr. WINDHAM's elegant introduction to his *Plan of Diſcipline for the Norfolk Militia* will be thought as convincing as any paſſage in Fitzherbert or Brook. " About the beginning of this century, " ſays he, the troops in Europe were univerſally " armed with firelocks; *to which*, much about " the ſame time, *the bayonet being added*, pikes " alſo were laid aſide. When the uſe of fire- " arms began to be generally eſtabliſhed, the *ne-* " *ceſſity of a great regularity and uniformity*, in " the manner of uſing thoſe arms, became appa- " rent: it was ſoon diſcovered, that thoſe troops, " which could make the briſkeſt fire, and ſuſtain " it longeſt, had a great ſuperiority over others " leſs expert; and, likewiſe, that *the efficacy and*

* Lamb. Eiren. 318. 1 Hale, H. P. C. 495.

" *power of fire did not conſiſt in random and ſcat-*
" *tering ſhots made without order, but in the fire*
" *of a body of men at once, and that properly timed*
" *and directed.* It was therefore *neceſſary* to ex-
" erciſe the troops in loading quick, and firing to-
" gether by the word of command; but, as the
" aukwardneſs, careleſſneſs, and raſhneſs, of
" young ſoldiers (if left to themſelves) muſt oc-
" caſion frequent accidents, and *the loſs of many*
" *of their own party*, by the unſkilful manner of
" uſing their fire-arms, eſpecially in the hurry of
" an engagement, it became a matter of *indiſpen-*
" *ſable neceſſity* to teach ſoldiers an *uniform* me-
" thod of performing every action that was to be
" done with the muſket, that they might all do
" it in *the moſt expeditious and ſafeſt manner.*"

Should any doubt be raiſed as to the legality of *aſſembling* for this purpoſe, and ſhould the words of Sir *Matthew Hale*, whom of all men I reſpect the moſt, be oppoſed to me, that, " where people are aſſembled in great numbers " armed with weapons offenſive, or weapons of " war, if they march thus armed in a body, if " they have choſen commanders or officers, if " they march *cum vexillis explicatis* or with " drums or trumpets, and the like, it may be " conſiderable, whether the greatneſs of their " numbers, and their continuance together doing " theſe acts, may not amount to *more guerrino*

" *arraiati*, or a levying of war*," which may be conſtrued an encroachment on the prerogative of the crown†; the anſwer is no leſs obvious than deciſive, in the language of BRACTON, that, *Voluntas et propoſitum diſtinguunt maleficia*‡; that, the intent being good, the act cannot be bad; and that *Bedingfield's* caſe is an expreſs authority for the legality of " marching armed in a body " *more guerrino arraiati*," even for the purpoſe of executing a civil proceſs, to which there is juſt expectation of violent reſiſtance. So neceſſary, indeed, is *order* and *diſcipline* in directing the exertions of an armed aſſembly, that the ſtatutes 3 and 4 Edw. VI. c. 5. and 1 Mary, c. 12. (which are no longer in force, but were the models of the well-known riot-act) expreſsly authorize the ſheriffs, juſtices, mayors, and bailiffs, " to raiſe *power* and *array them in manner of war* " againſt the rioters:" and here I may again apply thoſe ſound maxims, to which I before alluded: 1. That *the law requires no impoſſible things*; but it is impoſſible to join the power and ſuppreſs a riot effectually, without being at leaſt moderately ſkilled in the uſe of fire-arms, and ready in the common evolutions. 2. That, *when the law permits or enjoins the performance of any act, all the means of performing it are alſo*

* 1 H. P. C. 131. † 3 Inſt. 9. ‡ L. 3 c. 14. § 13.

permitted or enjoined; but the law doth permit and command *every ſubject of this realm* to arm himſelf and uſe his arms with effect for the ſuppreſſion of tumults: the concluſion, in both forms of reaſoning, follows too cloſely and too evidently to admit of a doubt.

That the four caſes, on which I have relied, have never been ſhaken by any later deciſion, appears from the uniform recognition of their authority by the beſt modern writers: indeed, nothing leſs than an act of the legiſlature could juſtly over-rule unanimous and well-conſidered reſolutions; but no act whatever has in any degree affected them; and the common law, which in general is the perfection of human wiſdom, happily in this inſtance has ſtood like a rock amid the conflict of ſtatutes rolling upon ſtatutes.

Neither of the ſtatutes of Weſtminſter had any effect on the deciſion in *Bedingfield's* caſe; nor was that of *St. John* at all influenced by the ſubſequent prohibition of hand-guns; nor the *Caſe of Arms* by the ſtatute of *Northampton*; and though the act of queen *Mary* was continued during the life of *Elizabeth*, yet Sir *Matthew Hale* obſerves, that, "the caſe of *Drayton* "*Baſſet* was not within that ſtatute, nor de- "pending on it*." In the ſame manner ſerjeant

* 1 H. P. C. 495.

Hawkins remarks, in conformity to *Hale* and to reaſon, which will very ſeldom be found at variance, "that the ſtat. 1. Geo. I. c. 5. commonly "called the riot-act, being wholly in the affirm-"ative, cannot be thought to take away any part "of the *authority* in the ſuppreſſing of a riot, "which was before that time given either to "officers, *or private perſons*, by the common law "or by ſtatute*."

Having ſhown the nature and extent of the *Poſſe Comitatuum*, and proved that it is required by law to be equal in its exertion to a well-diſciplined army, I have eſtabliſhed the propoſition, which I undertook to demonſtrate†: "That the "common and ſtatute laws of the realm, in force "at this day, give the *civil* ſtate in every county "a power, which, if it were perfectly underſtood "and continually prepared, would effectually "quell any riot or inſurrection, without aſſiſt-"ance from the *military*, and even without the "modern riot-act."

One ſide, therefore, of the diſtreſſing alternative, to which I was reduced, concerning the *precarioufneſs* of *Engliſh Freedom*‡, is happily removed; but the other ſide remains, "that our "laws have been diſgracefully neglected, and "ought to be reſtored to full vigour and "energy."

* 1 P. C. c. 65. † P. 466. ‡ P. 464.

To what fatal cauſe muſt we aſcribe a neglect ſo ſhameful and ſo dangerous? I anſwer boldly, yet, I hope, without arrogance, ſince I uſe the very words of BLACKSTONE, "to the vaſt ac-"quiſition of force ariſing from the riot-act and "the annual expedience of a ſtanding army*;" which has induced a diſpoſition, cheriſhed by the indolence natural to man, and promoted by the exceſſive voluptuouſneſs of the age, to look up ſolely for protection to the executive power and the ſoldiery; a diſpoſition, which muſt inſtantly be ſhaken off, if any ſpark of virtue remain in our boſoms; for, although we are happy in a prince, who "will never harbour a thought or "adopt a perſuaſion in any the remoteſt degree "detrimental to the liberty of *Britain*†," yet in free ſtates a military power muſt ever be an object of jealouſy; and, ſince our excellent conſtitution will be claimed by our poſterity as their beſt inheritance, we muſt act with a provident care, leſt, two centuries hence, the fable of the horſe ſhould be verified in our deſcendants, who may be in need of protection againſt their protectors, and be forced to carry *harneſs*, notwithſtanding the repeal of the ſtatute of *Winchester*.

For the hiſtory of the riot-act, ſo laboured and

* 4 Comm. 434. † 1 Bl. Comm. 337.

ſo ineffectual, I muſt refer my reader to the incomparable author, whom I ſo frequently cite, the commentator on the laws of *England*; who expreſſes his jealouſy and diſapprobation of it with no leſs delicacy than wiſdom*: in reſpect to the number of capital felonies created by it, which *Blackſtone* ſeems highly to have diſapproved, I ſhall ſay nothing, as it is not my preſent ſubject; but I may, with all due reverence for the legiſlature in the firſt year of GEORGE the Firſt, obſerve, that the act was a bad copy of a bad model, the ſtatute of Mary; that there ſeems to have been no occaſion to make it perpetual, much leſs to enlarge it; that it is in ſome parts liable to dangerous miſinterpretation; that it has been found wholly inadequate to the end propoſed by it; and that the third clauſe of it was in great meaſure unneceſſary, as it only affirms "our ancient law, which had pretty well guarded "againſt any violent breach of the peace†." Confirmatory ſtatutes are always attended with the danger of ſuperſeding the uſe, and obliterating the remembrance, of the common law, which they confirm, and which the wiſdom of ages had before ſufficiently eſtabliſhed.

As to the beſt mode of *reſtoring our laws to their full vigour and energy*, and of providing for

* 4 Comm. 143. † 4 Bl. Comm. 147.

our future defence, I ſhall certainly ſubmit it to the diſcretion of my countrymen who are bound by thoſe laws; and ſhall only ſuggeſt to them the following plan; after premiſing, in the words of ſerjeant *Hawkins*, "that, although "*private perſons may arm themſelves* in order to "ſuppreſs a riot, and may conſequently *uſe arms* "in the ſuppreſſing of it, if there be a neceſſity "for their ſo doing; yet it ſeems to be extremely "hazardous for private perſons to proceed to "thoſe extremities in *common* caſes, leſt, under "the pretence of keeping the peace, they cauſe a "more enormous breach of it; and, therefore, "ſuch violent methods ſeem only *proper* againſt "SUCH RIOTS AS SAVOUR OF REBELLION, for "the ſuppreſſing of which no remedies can be "too ſevere*."

THE PLAN.

I.

Let all ſuch perſons in every county of ENGLAND as are included in the *power* of that county, and *are of ability to provide themſelves with arms*, and pay for learning the uſe of them, be furniſhed each with his *muſket* and *bayonet*, and their neceſſary appendages.

* 1 Hawk. P. C. c. 65.

II.

Let ſeveral *companies* be formed, in every county, of ſixty ſuch men or more, voluntarily aſſociated for the ſole purpoſe of joining the power, when legally ſummoned, and, with that view, of learning the proper uſe of their weapons, ſtreet-firing, and the various evolutions neceſſary in action.

III.

Let the companies be taught, in the moſt private and orderly manner, for two or three hours early every morning, until they are competently ſkilled in the uſe of their arms: let them not, unneceſſarily, march through ſtreets or high-roads, nor make any the leaſt *military* parade, but conſider themſelves entirely as part of the *civil* ſtate.

IV.

Let each member of a company, when he has learned the uſe of his arms, keep them for the defence of his houſe and perſon, and be *ready* to join his company in uſing them for the ſuppreſſion of riots, whenever the ſheriff, under-ſheriff, or peace officer ſhall raiſe the power, or there ſhall be *a cry made for weapons to keep the peace.*

V.

Let the *caution*, prefixed to this plan, be di-

ligently obſerved, and the law, contained in the preceding citations, be held ever ſacred: nor let any *private* perſon preſume to raiſe the power of the county*, which is the province of the ſheriff, under-ſheriff or magiſtrate; although *a cry for weapons to keep the peace* may be made in caſes of extreme *neceſſity*, and in them only, by *private perſons*.

VI.

If any mark of diſtinction in dreſs ſhall be thought expedient, that the ſeveral companies may know each other, in the forcible ſuppreſſion of a riot, let ſuch a regulation be ſeverally referred, with any other rules that may be neceſſary, to a committee choſen out of each company.

The great advantages of ſuch aſſociations are ſo apparent, that I ſhall forbear at preſent to expatiate on them; but ſhall be ſatisfied with applying to them what PULTON ſays of the old tilts and juſts, "that the cauſe, beginning, and "end thereof do tend do the laudable exerciſe of "true valour and manhood, and to the encou-"ragement and enabling of the actors therein to "defend the realm and the peace thereof†;" and with obſerving, in the words of the ſtat. 33.

* 1 Hale, H. P. C. 601. † De Pace, 25. b.

Hen. VIII. c. 6, that the muſket may now be made, what the long bow was formerly, "the "ſurety, ſafeguard, and continual defence, of "this realm of *England*, and an ineſtimable "dread and terror to the enemies of the ſame."

Objections will certainly be raiſed; for who can propoſe a meaſure, however ſalutary, to which no man will object? I expect them, however, chiefly from thoſe, whoſe indolence may induce them rather to ſeek protection from a power able to cruſh them, than to protect themſelves by joining a power provided by free and equal laws; or from thoſe, who, as MILTON ſays, "have betaken themſelves to ſtate-affairs "with ſouls ſo unprincipled in virtue and true "generous breeding, that flattery, and court-"ſhifts, and tyrannous aphoriſms, appear to "them the higheſt points of wiſdom." To ſuch men it will be ſufficient to give this general anſwer; that, as there is no neceſſity of applying either to the executive, or to the legiſlative, power for permiſſion to obey the laws, we are not to debate on vague notions of expedience, groundleſs jealouſies, or imaginary conſequences: the ſole queſtion is, "whether the doctrine ex-"pounded in theſe pages *be law*;" if it be, there is no room for deliberation, ſince it is a maxim, that *no man muſt think himſelf wiſer than the law*, which is the gathered wiſdom of many ages; and

ſo favourable is the *common* law of ENGLAND to the rights of our ſpecies, which it is unhappily become the faſhion to deride and vilify, that, if any man will broach a poſition in favour of genuine, rational, manly freedom, I will engage to ſupply him with abundant authorities in ſupport of it.

I perſuade myſelf, that infinite good muſt reſult from the general adoption of my plan; and that no poſſible evil can be mixed with it, as long as the cautions and reſtrictions before ſuggeſted ſhall be duly obſerved, and our excellent conſtitution be kept in its juſt balance at that nice point, which is equally removed from the pernicious extremes of republican madneſs, ariſtocratical pride, and monarchical folly; nor have I any ſcruple to confeſs, that, as every ſoldier in ENGLAND is at the ſame time a citizen, I wiſh to ſee every citizen able at leaſt, for the preſervation of publick peace, to act as a ſoldier: when that ſhall be the caſe, the LIBERTY OF BRITAIN will ever be unaſſailed; for this plain reaſon—it will be unaſſailable.

The ſecurity, and conſequently the happineſs, of a free people do not conſiſt in their belief, however firm, that the executive power will not attempt to invade their juſt rights, but in their conſciouſneſs that any ſuch attempt would be wholly ineffectual.

SPEECH

TO

THE ASSEMBLED INHABITANTS OF

THE COUNTIES OF

MIDDLESEX AND SURRY,

THE CITIES OF

LONDON AND WESTMINSTER,

AND THE BOROUGH OF

SOUTHWARK.

XXVIII MAY, M.DCC.LXXXII.

ADVERTISEMENT.

HAVING been informed, that parts of my Speech on the 28th of May at the London Tavern *were thought obſcure, yet important, I have endeavoured to recollect what I then took the liberty to ſay, and have conſented to let the argument go abroad in its rude and unpoliſhed ſtate. What offence this publication may give, either in parts or in the whole, is the laſt and leaſt of my cares: my firſt and greateſt is, to ſpeak on all occaſions what I conceive to be juſt and true.*

A

SPEECH

ON

THE REFORMATION OF PARLIAMENT.

MY LORD MAYOR,

SO far am I from riſing to intimate the ſlighteſt ſhade of diſſent from this reſpectable and unanimous aſſembly, or the minuteſt diſapprobation of the two reſolutions propoſed, that I deſpair of finding words ſufficiently ſtrong to expreſs my joy and triumph at the perfect harmony, with which the firſt of them has already paſſed, and to which the ſecond will, I truſt, be thought equally entitled: but, on the laſt reading of the propoſition now before you, it ſtruck me, that, although it was in *ſubſtance* unexceptionable, yet it might eaſily be improved in *form* by the inſertion of two or three words referring to the preceding reſolution, and thus be rendered more conducive to our great object of generally declaring our concurrent ſenſe, and avoiding any chance of diſunion upon ſpecifick points. Every

propoſition, intended to meet with univerſal concurrence, ought to have three diſtinguiſhing properties; it ſhould be juſt, ſimple, comprehenſive: without juſtice, it will be rejected by the wiſe and good; without ſimplicity, it will involve complex matter, on which the wiſeſt and the beſt may naturally differ; and without comprehenſiveneſs, it will never anſwer any purpoſe of conſequence and extent. The firſt reſolution, "that petitions ought to be prepared for a more "complete repreſentation of the people," has all of theſe properties in an eminent degree: it is ſo juſt, that, if this meeting had been ten times as large, there would not have been one diſſentient voice on that ground; ſo ſimple, that it affords no ſcope or ſubject for cavil; ſo comprehenſive, that, when the houſe of commons have the petitions before them, it will give room for every particular plan, which the ingenuity of any member, duly tempered by wiſdom, yet actuated by true patriotiſm, can ſuggeſt.

Ought not the *ſecond* propoſition, "that the "*ſenſe of the people* ſhould be taken this ſum-"mer in order to prepare their *ſeveral* petitions," to be ſomewhat reſtrained in the generality of the expreſſion? It is juſt, but rather *too* comprehenſive: *the ſenſe of the people* is a phraſe of meaſureleſs compaſs, and may include their ſeveral opinions, however ſpecifick, however dif-

cordant. This is the very evil, which we are anxious to prevent; ſince we all agree, that no particular mode of reformation ſhould be preſcribed to the houſe, leſt they ſhould reject, for no other reaſon, ſome good plan, which, if left to the operation of their own minds, they may probably adopt. Might not the ſentence be thus corrected, "that the ſenſe of the people ſhould be taken *on the preceding reſolution?*" But this I offer as a mere ſuggeſtion to wiſer heads, and will not trouble the aſſembly by ſhaping it into a motion: indeed, if both reſolutions be taken together, and it be underſtood, that we mean to recommend petitions on the *general* ground, in order to ſhun that fatal rock, *diverſity of ſentiment on particulars*, I deſire no more, and am very little ſolicitous about accuracy of expreſſion; hoping at the ſame time, although the *five* circles here aſſembled have no right or pretenſion to take the lead in the nation, yet that the other counties, diſtricts, and towns in *Great Britain* will approve our idea, and not diſdain to follow our example: in that event I ſmile at the thought of a miſcarriage, and am confident, that, with concurrence, perſeverance, and moderation, the people of *England* muſt prevail in a claim ſo eſſential to their liberty, and to the permanence of an adminiſtration, who profeſs to govern with their confidence.

Here I ſhould regularly ceaſe; eſpecially, as I now labour under the preſſure of the epidemical complaint, which alone can have prevented this meeting from being as numerous as it is reſpectable: it could not prevent my attendance, for, in health or in ſickneſs, I am devoted to your ſervice; and I ſhall never forget the words of an old *Roman*, LIGARIUS; who, when the liberties of his country were in imminent danger, and when a real friend to thoſe liberties was condoling with him on his illneſs at ſo critical a time, raiſed himſelf on his couch, ſeiſed the hand of his friend, and ſaid, *If you have any buſineſs worthy of yourſelves, I am well.*

It was not in truth my deſign to have ſpoken at all this evening; but, ſince I have riſen to explain a ſudden thought, I will avail myſelf of your favourable attention, and hazard a few words upon the *general* queſtion itſelf: on the ſmalleſt intimation of your wiſhes, I will be ſilent. Numbers will have patience to hear, who have not time to read; beſides, that it is always eaſier to ſpeak than to write; and, as to myſelf, a very particular and urgent occaſion, which calls me for ſome months from *England*, will deprive me of another opportunity to communicate my ſentiments in either form, until the momentous object before us ſhall be made certainly attainable through the concord, or for ever loſt

and irrecoverable through the diſagreement, of the nation.

The only *ſpecious* argument, that I have anywhere heard, againſt a change in the parliamentary repreſentation of the people, is, that, "a *conſtitution*, which has ſtood for ages, ought "not to be altered."

This objection appears on a ſuperficial view ſo plauſible, and applies itſelf ſo winningly to the hearts of *Engliſhmen*, who have an honeſt prejudice for their eſtabliſhed ſyſtem, without having in general very diſtinct ideas of it, that a detection of the *ſophiſm*, for ſuch I engage to prove it, becomes abſolutely neceſſary for the promotion of your glorious enterpriſe.

I will riſk your impatience; for, though I am aware, that alluſions to hiſtory and interpretations of old ſtatutes are not very proper in addreſſes to popular aſſemblies; yet, when popular aſſemblies take upon them, as they juſtly may, to act and reſolve upon conſtitutional points, they are bound to ſeek or to receive information, leſt their actions ſhould be raſh and their reſolutions ill-founded. A power exerted through paſſion or caprice, without a deep knowledge of the buſineſs in hand, and a fair application of the intellectual faculties, is a *tyrannical* power, whether it be regal, ariſtocratical, *or popular*; and the prevalence of any ſuch power, by the overbearing

ſtrength of king, nobles, *or people*, would form an immediate *tyranny*, and in a moment ſubvert the conſtitution.

That conſtitution, which, I perſuade myſelf, will not be ſubverted, conſiſts of form and ſpirit, of body (if I may ſo expreſs myſelf), and of ſoul: but, in a courſe of years, the form is apt to deviate ſo widely from the ſpirit, that it becomes expedient almoſt every century to reſtore its genuine purity and lovelineſs. The objection, which I undertake to remove, is ſophiſtical, either by deſign or through ignorance; for the propoſition is true in one ſenſe of the word *conſtitution*, and falſe in the other; and the ſenſe, in which it is true, is inapplicable to the queſtion. It is true, that the *ſpirit* of the conſtitution ought not to be changed: it is falſe, that the *form* ought not to be corrected; and I will now demonſtrate, "that the ſpirit of our conſtitution requires a "repreſentation of the people, nearly equal and "nearly univerſal." Such as cannot or will not follow me in the premiſſes, both can and will (or I greatly deceive myſelf) bear away the concluſion in their memory; and it is of higher importance than they may imagine.

There has been a continued war in the conſtitution of *England* between two jarring principles; the evil principle of the feudal ſyſtem with his dark auxiliaries, ignorance and falſe philoſo-

SPEECH

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four hundred years ago, ordains, that, "*all* "they, who are preſent at the county court, as "well ſuitors *duly ſummoned* for the ſame cauſe, "*as others*, ſhall proceed to the election of their "knights for the parliament." *All ſuitors*, you ſee, had the right; and *all freeholders* were *ſuitors* in the court, however low the value of their freeholds. Obſerve all along, that one pound in thoſe days was equal to ten at leaſt in the preſent time. Here then is a plain declaration, that minuteneſs of *real* property created no harſh ſuſpicion of a dependent mind; for a harſh ſuſpicion it is, and, by proving too much, proves nothing.

What cauſed the abſurd, yet fatal, diſtinction between property, perſonal and real? The feudal principle. What created another odious diſtinction between *free* and *baſe* holdings, and thus excluded copyholds of any value? The feudal principle. What introduced an order of men, called *villains*, transferable, like cattle, with the land which they ſtocked? The feudal principle. What excludes the holders of beneficial leaſes? The feudal principle. What made perſonalty, in thoſe times, of little or no eſtimation? The feudal principle. What raiſed the ſilly notion, that the property, not the perſon, of the ſubject, was to be repreſented? The feudal principle. What prevented the large proviſion in

the act of *Henry* IV. by which *all freeholders* were declared electors, from being extended to *all* holders of *property*, however denominated, however inconſiderable? The ſame infernal principle, which then ſubdued and ſtifled the genuine equaliſing ſpirit of our conſtitution. Now, if we find that this demon was himſelf in proceſs of time ſubdued, as he certainly was by the extenſion of commerce under *Elizabeth*, and the enlarged conceptions which extended commerce always produces, by the revival of learning, which diſpelled the darkneſs of *Gothick* ignorance, and by the great tranſactions of the laſt century, when the true theory and genuine principles of freedom were unfolded and illuſtrated, we ſhall not heſitate to pronounce, that, by the *ſpirit* of our conſtitution, all *Engliſhmen*, having property of any kind or quantity, are entitled to votes in chuſing parliamentary delegates. The *form* ſoon received a cruel blemiſh; for, in the *eighth* of HENRY VI. the property of ſuitors qualified to vote, was reſtrained to "*forty* ſhil-"lings a year above all charges," that is, to twenty pounds at leaſt by the preſent value of money. I agree with thoſe, who conſider this act as baſely ariſtocratical, as a wicked invaſion of clear popular rights, and therefore in a high degree unconſtitutional: it is alſo a diſgraceful confeſſion of legiſlative weakneſs; for the evil,

pretended to be remedied by it, was, that the county elections were *tumultuary*. What! could not the wiſdom of the legiſlature ſuggeſt a mode of preventing tumult, if the laws already ſubſiſting had been inſufficient for that purpoſe, without ſhaking the obligation of all future laws, by narrowing the circle of thoſe, who, being affected by them, ought by natural equity to aſſiſt in framing them? Ridiculous and indefenſible!

In the *twelfth* of CHARLES II. the mighty fabrick of the feudal ſyſtem was ſhaken from its baſis; but, though its ramparts were overſet, its connexions and covered ways deſtroyed, and its very foundations convulſed, yet the ruins of it have been found replete with miſchief, and the miſchief operates, even while I ſpeak.

At the Revolution, indeed, the good ſpirit of the conſtitution was called forth, and its fair principles expanded: it is only ſince that auſpicious event, that, although we may laugh, when lawyers call their vaſt aſſemblage of ſenſe and ſubtilty *the perfection of human wiſdom*, yet we ſhall deride no man, who aſſerts the conſtitution of *England* to be in theory the moſt perfect of human ſyſtems—in theory, not in practice; for, although you are clearly entitled to all the advantages, which the *principles* of the conſtitution give you, while you claim thoſe advantages by

cool and decent petition, yet, either from ſome unaccountable narrowneſs in the managers of the Revolution, or from the novelty and difficulty of their ſituation, they left their noble work ſo unfiniſhed, and the feudal poiſon ſo little exterminated, that, to uſe the words of your favourite poet, "they ſcotched the ſnake, not killed it." Who could have imagined, that, in the *eighteenth* of GEORGE II. the ſtatute of *Henry* VI. would have been adopted and almoſt tranſcribed? Who could have dreamed, that, in the *thirty-firſt* of the ſame king, the laſt act would have been recited and approved, with a declaration added, that no tenant by copy of court roll ſhould vote at an election for knights of the ſhire under penalty of fifty pounds? It was the accurſed feudal principle, which ſuggeſted theſe laws, when the faireſt opportunity preſented itſelf of renovating the conſtitution. Another gale has now ſprung up; and, unleſs you catch it while it blows, it will be gone for ever.

I have proved, unleſs I delude myſelf, "that the "ſpirit of our conſtitution requires a repreſentation "of the people nearly equal and nearly univer-"ſal." Carry this propoſition home with you, and keep it as an anſwer to thoſe, who exclaim "that "the conſtitution ought not to be changed." I ſaid *nearly* univerſal; for I admit, that our conſtitution, both in form and ſpirit, requires *ſome* pro-

perty in electors, either real or perſonal, in poſſeſſion or in action; but I conſider a *fair trade* or *profeſſion* as *valuable property*, and an *Engliſhman*, who can ſupport himſelf by honeſt induſtry, though in a low ſtation, has often a more independent mind than the prodigal owner of a large encumbered eſtate. When *Prynne* ſpeaks of *every inhabitant and commoner*, to whom he ſuppoſes that the right of voting originally belonged, I cannot perſuade myſelf, that he meaned to include ſuch as, having nothing at all, and being unable or unwilling to gain any thing by art or labour, were ſupported by alms.

If modern authorities be demanded in aid of my opinions, I ſhall only mention the great judge, Sir *William Blackſtone*, and I mention him the more willingly, becauſe he never profeſſed democratical ſentiments, and, though we admire him as the ſyſtematical arranger of our laws, yet we may fairly doubt the popularity of his political notions: nevertheleſs, he openly allows in his Commentary, "that the ſpirit of our conſti-"tution is in favour of a more complete repre-"ſentation of the people." This too is allowed by the very man, who, in another tract, intimates an opinion, "that the value of freeholds them-"ſelves ſhould be greatly advanced above what "is now required by law to give the proprietor "a voice in county elections." I told you, that

all reaſoning from the ſtatute of *Henry* VI. proved too much, and, conſequently, nothing; for, who now would bear the idea of diſqualifying thoſe electors of *Surry* and *Middleſex*, whoſe freeholds were not of the annual value of twenty pounds?

I hear a murmur among you, and perceive other marks of impatience. Indulge me a moment, and I will deſcend; but let me not be miſapprehended. I do not propoſe to conclude with a ſpecifick motion: it is my deliberate opinion, confirmed by my obſervations on the event of your aſſociations *to reduce the influence of the Crown*, that your petitions and reſolutions muſt be *very general*. In my own mind I go along with you to the full length of your wiſhes. If the preſent ſyſtem of repreſentation be juſtly compared to a tree rotten at the heart, I wiſh to ſee removed every particle of its rottenneſs, that a microſcopick eye could diſcern. I deride many of the faſhionable doctrines: that of *virtual* repreſentation I hold to be *actual* folly; as childiſh, as if they were to talk of *negative* repreſentation, and to contend, that it involved any *poſitive* idea. Subſtitute the word *delegation* or *deputation*, inſtead of repreſentation, and you will inſtantly ſee the abſurdity of the conceit. Does a man, who is *virtually*, not *actually*, re-

preſented, delegate or depute any perſon to make thoſe laws, which may affect his property, his freedom, and his life? None; for he has no ſuffrage. How then is he repreſented according to the principles of our conſtitution? As well might a *Roman* tyrant have urged, that all his vaſſals were repreſented in his perſon: he was augur and high prieſt; the religious ſtate was, therefore, repreſented by him: he was tribune of the people; the popular part of the nation were, therefore, repreſented: he was conſul, dictator, maſter of the horſe, every thing he pleaſed; the civil and military ſtates were, therefore, concentrated in him; the next deduction would have been, that the ſlaves of his empire were free men. There is no end of abſurdities deducible from ſo idle a play upon words.

That there may be an end of my addreſs to you, which has been too long for the place and occaſion, but too ſhort for the ſubject, I reſume my ſeat with a full conviction, that, if united, and dependent on Yourſelves alone, you muſt ſucceed; if diſunited, or too confident in others, you muſt fail. Be perſuaded alſo, that the people of *England* can only expect to be the happieſt and moſt

glorious, while they are the freeſt, and can only become the freeſt, when they ſhall be the moſt virtuous, and moſt enlightened, of nations.

TO * * * *

London, May 14, 1782.

SIR,

I TAKE the liberty of ſubmitting to your ſerious attention the *Plan* of *National Defence* lately ſuggeſted by government, compared with a *different* plan now approved, though ſubject to reviſion, by a *Company of Loyal Engliſhmen*, of which I have the honour to be One. You will inſtantly ſee, that the *firſt* plan was nobly conceived by ſome great mind, and intended for the nobleſt purpoſes; but that, in the *detail*, it appears to be *innovating*, harſh, unconſtitutional, and big with alarming conſequences; too *expenſive* for the treaſury, who have no treaſures to laviſh, and too *diſtruſtful* of a generous and ſpirited people, who would *vigorouſly ſupport* a government that *ſincerely confided* in them. The *ſecond* plan you will find (and we pledge our honours to prove) *already ſanctioned*, and even *required*, by Law, agreeable to the Conſtitution, and calculated to preſerve it; not too expenſive to *real* patriots, who will hardly be niggards at ſuch a moment as this; and not at all dangerous to ſo wiſe and juſt a

government as the preſent. If nothing can raiſe a manly ſpirit, and excite a liberal emulation, in *Engliſh* gentlemen, yeomen, and traders, but the actual deſcent of *three united armies* on our coaſts, they will *then* vainly ſolicit that protection for their houſes and families, which they *now* have in their own hands, on a glorious invitation from the Firſt and Beſt of Magiſtrates.

I am, &c.

A VOLUNTEER.

P. S. Give me leave to obſerve, that the Lords-Lieutenants, as ſuch, have no more to do with this great buſineſs than the bench of Biſhops.

14th. His Majeſty ſhall then have power to order the ſaid corps to march to any part of Great Britain, as his ſervices may require.

15th. They are, on ſuch occaſions, to act either ſeparately, or in conjunction with his Majeſty's regular forces, and be under the command of ſuch General officers as his Majeſty ſhall think proper to appoint.

16th. Both officers and men to receive full pay as his Majeſty's other regiments of foot from the day of their march, and as long as they ſhall continue on ſervice out of their towns.

17th. They are to be ſubject to military diſcipline, in the ſame manner as his Majeſty's regular forces, during the ſaid time of their being called out, and receiving government pay.

18th. All officers who ſhould be diſabled in actual ſervice to be entitled to half-pay, and all non-commiſſioned officers and private men, diſabled, to receive the benefit of Chelſea Hoſpital.

19th. The widows of officers killed in the ſervice to have a penſion for life.

20th. The time of ſervice to be named.

as the Adjutant or Town-Major, to be in the Government pay.

7th. The men to exerciſe frequently, either in battalions, or by companies, on Sundays, and on Holidays, and alſo after their work is over in the evenings.

8th. Arms, accoutrements, and ammunition, to be furniſhed at the expence of Government, if required.

9th. Proper magazines, or ſtorehouſes, to be choſen or erected in each town, for keeping the ſaid arms, &c.

10th. The arms and accoutrements to be delivered out at times of exerciſe only, and to be returned into the ſtorehouſes as ſoon as the exerciſe is finiſhed.

11th. The Adjutant or Town-Major to be always preſent at exerciſe, and to ſee that the men afterwards march regularly, and lodge their arms in the ſtorehouſes.

12th. Proper penalties to be inflicted on ſuch as abſent themſelves from exerciſes, as alſo for diſobedience of orders, inſolence to their officers, and other diſorderly behaviour.

13th. The above Corps not to be obliged, on any account, or by any authority whatever, to move from their reſpective towns, except in times of actual invaſion or rebellion.

6th. The ſaid Drill-Serjeants and Corporals *from the army* to *continue* in the pay of government; but the Adjutants and Town-Majors to be paid, *if they deſire pay*, out of a *fund* voluntarily raiſed for that purpoſe in the ſeveral counties and towns.

7th. Agreed.

8th. Arms, Accoutrements, and Ammunition, to be furniſhed at the expenſe of *the counties and towns, if required*; or of the *officers*, if they are generouſly diſpoſed,

9th. The ſaid arms, &c. to be kept by each man, in *his own houſe*, for his *legal* protection.

10th. Rejected.

11th. The *officers* to take care, after exerciſe, that the men march regularly, and return home with their arms.

12th. Agreed, *with this addition*—A ſet of *Laws*, or *Articles*, to be drawn up by the Officers, and *ſubſcribed* or *openly conſented to* by the men, *after a diſtinct reading and explanation of each article*. "Conſenſus facit Legem."

13th. Agreed, the words *counties or* being inſerted after the word *reſpective*.

14th. The *high ſheriff* of each *county*, and *chief magiſtrate* of each *town*, ſhall then (on due notice to government) have power to order the ſaid corps to march to any part of

Great Britain, as the *publick* ſervice may require.

15th. Agreed, in caſe of *actual invaſion*; but in *riots* the *magiſtrates* to call out their reſpective *corps:* and, as to *rebellion*, or *civil* war, (which GOD avert!) no ſpecifick proviſions can be made for ſo dreadful and improbable an event.

16th. The counties and towns to pay the men *who require it*; but ſuch, as enrol themſelves *without* pay, to wear ſome mark of diſtinction, and the officers to ſerve at *their own* expenſe.

17th. Agreed, in caſe of *actual invaſion* only; but the words, *and receiving government pay*, to be omitted.

18th. Officers diſabled in actual ſervice to be rewarded by a *new order* (as a ſtar and ribband, *orange coloured* or mixed), or by an *eulogium proclaimed* and *recorded* by the *ſheriffs* of their ſeveral *counties*, or the *chief magiſtrates* of their corporate *towns*; and the men to receive a comfortable ſubſiſtence at their own homes, with a fixed *annuity for life* out of the voluntary fund.

19th. The *widows* and *children* of Officers and Men killed in the ſervice *againſt invaders* to have alſo *penſions for life*.

20th. The companies called out as above to be discharged *ipso facto*, as soon as the *invaders* are *repelled*, or the *particular service terminated*.

A Company of LOYAL ENGLISH GENTLEMEN.

THE

PRINCIPLES OF GOVERNMENT,

IN

A DIALOGUE

BETWEEN

A GENTLEMAN AND A FARMER.

ADVERTISEMENT.

A SHORT defence hath been thought neceſſary, againſt a violent and groundleſs attack upon the FLINTSHIRE COMMITTEE, for having teſtified their approbation of the following Dialogue, which hath been publickly branded with the moſt injurious epithets; and it is conceived, that the ſure way, to vindicate this little Tract from ſo unjuſt a character, will be as publickly to produce it.—— The friends of the Revolution will inſtantly ſee, that it contains no principle, which has not the ſupport of the higheſt authority, as well as the cleareſt reaſon.

If the doctrines which it ſlightly touches, in a manner ſuited to the nature of the Dialogue, be "ſeditious, treaſonable, and diabolical," Lord *Somers* was an incendiary, *Locke* a traitor, and the *Convention-parliament* a pandæmonium; but, if thoſe names are the glory and boaſt of *England*, and if that convention ſecured our liberty and happineſs, then the doctrines in queſtion are not only *juſt* and *rational* but *conſtitutional* and *ſalutary*; and the reproachful epithets belong wholly to the ſyſtem of thoſe, who ſo groſsly miſapplied them.

THE

PRINCIPLES OF GOVERNMENT.

F. WHY ſhould humble men, like me, ſign or ſet marks to petitions of this nature? It is better for us Farmers to mind our huſbandry, and leave what we cannot comprehend to the King and Parliament.

G. You can comprehend more than you imagine; and, as a *free member of a free ſtate*, have higher things to mind than you may conceive.

F. If by *free* you mean *out of priſon*, I hope to continue ſo, as long as I can pay my rent to the 'ſquire's bailiff; but what is meant by a *free ſtate?*

G. Tell me firſt what is meant by a club in the village, of which I know you to be a member.

F. It is an aſſembly of men, who meet after work every Saturday to be merry and happy for a few hours in the week.

G. Have you no other object but mirth?

F. Yes; we have a box, into which we con-

tribute equally from our monthly or weekly ſavings, and out of which any members of the club are to be relieved in ſickneſs or poverty; for the pariſh officers are ſo cruel and inſolent, that it were better to ſtarve than apply to them for relief.

G. Did they, or the 'ſquire, or the parſon, or all together, compel you to form this ſociety?

F. Oh! no—we could not be compelled; we formed it by our own choice.

G. You did right——But have you not ſome head or preſident of your club?

F. The maſter for each night is choſen by all the company preſent the week before.

G. Does he make laws to bind you in caſe of ill temper or miſbehaviour?

F. He make laws! He bind us! No; we have all agreed to a ſet of equal rules, which are ſigned by every new comer, and were written in a ſtrange hand by young *Spelman*, the lawyer's clerk, whoſe uncle is a member.

G. What ſhould you do, if any one member were to inſiſt on becoming *perpetual* maſter, and on altering your rules at his arbitrary will and pleaſure?

F. We ſhould expel him.

G. What, if he were to bring a ſerjeant's guard, when the militia are quartered in your

neighbourhood, and inſiſt upon your obeying him?

F. We ſhould reſiſt, if we could; if not, the ſociety would be broken up.

G. Suppoſe that, with his ſerjeant's guard, he were to take the money out of the box or out of your pockets?

F. Would not that be a robbery?

G. I am ſeeking information from you. How ſhould you act on ſuch an occaſion?

F. We ſhould ſubmit, perhaps, at that time; but ſhould afterwards try to apprehend the robbers.

G. What, if you could not apprehend them?

F. We might kill them, I ſhould think; and, if the King would not pardon us, God would.

G. How could you either apprehend them, or, if they reſiſted, kill them, without a ſufficient force in your own hands?

F. Oh! we are all good players at ſingle ſtick, and each of us has a ſtout cudgel or quarter-ſtaff in the corner of his room.

G. Suppoſe that a few of the club were to domineer over the reſt, and inſiſt upon making laws for them——

F. We muſt take the ſame courſe; except that it would be eaſier to reſtrain one man, than

a number; but we ſhould be the majority with juſtice on our ſide.

G. A word or two on another head. Some of you, I preſume, are no great accountants.

F. Few of us underſtand accounts; but we truſt old *Lilly* the ſchoolmaſter, whom we believe to be an honeſt man; and he keeps the key of our box.

G. If your money ſhould in time amount to a large ſum, it might not perhaps be ſafe, to keep it at his houſe or in any private houſe.

F. Where elſe ſhould we keep it?

G. You might chuſe to put it into the funds, or to lend it the 'ſquire, who has loſt ſo much lately at *Newmarket*, taking his bond or ſome of his fields as your ſecurity for payment with intereſt.

F. We muſt in that caſe confide in young *Spelman*, who will ſoon ſet up for himſelf, and, if a lawyer can be honeſt, will be an honeſt lawyer.

G. What power do you give to *Lilly*, or ſhould you give to *Spelman* in the caſe ſuppoſed?

F. No power. We ſhould give them both a due allowance for their trouble, and ſhould expect a faithful account of all they had done for us.

G. Honeſt men may change their nature. What, if both or either of them were to deceive you.

F. We ſhould remove them, put our truſt in better men, and try to repair our loſs.

G. Did it never occur to you, that every ſtate or nation was only a great *club?*

F. Nothing ever occurred to me on the ſubject; for I never thought about it.

G. Though you never thought before on the ſubject, yet you may be able to tell me, why you ſuppoſe men to have aſſembled, and to have formed *nations, communities,* or *ſtates,* which all mean the ſame thing.

F. In order, I ſhould imagine, to be as happy as they can, while they live.

G. By *happy* do you mean *merry* only?

F. To be as merry as they can without hurting themſelves or their neighbours, but chiefly to ſecure themſelves from danger, and to relieve their wants.

G. Do you believe, that any King or Emperor compelled them ſo to aſſociate?

F. How could one man compel a multitude? A King or an Emperor, I preſume, is not born with a hundred hands.

G. When a prince of the blood ſhall in any country be ſo diſtinguiſhed by nature, I ſhall then, and

then only, conceive him to be a greater man than you. But might not an army, with a King or General at their head, have compelled them to aſſemble?

F. Yes; but the army muſt have been formed by their own choice. One man or a few can never govern many without their conſent.

G. Suppoſe, however, that a multitude of men, aſſembled in a town or city, were to chuſe a King or Governor, might they not give him high power and authority?

F. To be ſure; but they would never be ſo mad, I hope, as to give him a power of making their *laws*.

G. Who elſe ſhould make them?

F. The *whole* nation or people.

G. What, if they diſagreed?

F. The opinion of the *greater number*, as in our village-clubs, muſt be taken and prevail.

G. What could be done, if the ſociety were ſo large, that all could not meet in the ſame place?

F. A greater number muſt chuſe a leſs.

G. Who ſhould be the chuſers?

F. All, who are not *upon the pariſh*. In our club, if a man aſks relief of the overſeer, he ceaſes to be one of us, becauſe he muſt depend on the overſeer.

G. Could not a few men, one in ſeven for inſtance, chuſe the aſſembly of law-makers as well as a larger number?

F. As conveniently, perhaps; but I would not ſuffer any man to chuſe another, who was to make laws, by which my money or my life might be taken from me.

G. Have you a *freehold* in any county of forty ſhillings a year?

F. I have nothing in the world but my cattle, implements of huſbandry, and houſehold goods, together with my farm, for which I pay a fixed rent to the 'ſquire.

G. Have you a vote in any city or borough?

F. I have no vote at all; but am able by my honeſt labour to ſupport my wife and four children; and, whilſt I act honeſtly, I may defy the laws.

G. Can you be ignorant, that the Parliament, to which members are ſent by this county, and by the next market-town, have power to make new laws, by which you and your family may be ſtripped of your goods, thrown into priſon, and even deprived of life?

F. A dreadful power! I never made inquiries, having buſineſs of my own, concerning the buſineſs of Parliament, but imagined, that the laws had been fixed for many hundred years.

G. The common laws, to which you refer, are equal, juſt, and humane; but the King and Parliament may alter them, when they pleaſe.

F. The King ought, therefore, to be a good man, and the Parliament to conſiſt of men equally good.

G. The King alone can do no harm; but who muſt judge the goodneſs of Parliament-men?

F. All thoſe whoſe property, freedom, and lives may be affected by their laws.

G. Yet ſix men in ſeven, who inhabit this kingdom, have, like you, no votes; and the petition, which I deſired you to ſign, has nothing for its object, but the reſtoration of you all to the right of chuſing thoſe law-makers, by whom your money or your lives may be taken from you. Attend, while I read it diſtinctly.

F. Give me your pen—I never wrote my name, ill as it may be written, with greater eagerneſs.

G. I applaud you, and truſt, that your example will be followed by millions. Another word before we part. Recollect your opinion about your club in the village, and tell me what ought to be the conſequence, if the King alone were to inſiſt on making laws, or on altering them at his will and pleaſure.

F. He too muſt be expelled.

G. Oh! but think of his ſtanding army and of the militia, which now are his in ſubſtance, though ours in form.

F. If he were to employ that force againſt the nation, they would and ought to reſiſt him, or the ſtate would ceaſe to be a ſtate.

G. What, if the great accountants and great lawyers, the *Lillys* and *Spelmans*, of the nation were to abuſe their truſt, and cruelly injure, inſtead of faithfully ſerving, the publick?

F. We muſt requeſt the King to remove them, and make trial of others, but none ſhould implicitly be truſted.

G. But what, if a few great lords or wealthy men were to keep the king himſelf in ſubjection, yet exert his force, laviſh his treaſure, and miſuſe his name, ſo as to domineer over the people, and manage the Parliament.

F. We muſt fight for the King and ourſelves.

G. You talk of fighting, as if you were ſpeaking of ſome ruſtick engagement at a wake; but your quarter-ſtaffs would avail you little againſt bayonets.

F. We might eaſily provide ourſelves with better arms.

G. Not ſo eaſily; when the moment of reſiſtance came, you would be deprived of all arms; and thoſe who ſhould furniſh you with

them, or exhort you to take them up, would be called traitors, and probably put to death.

F. We ought always, therefore, to be ready; and keep each of us a ſtrong firelock in the corner of his bed-room.

G. That would be legal as well as rational. Are you, my honeſt friend, provided with a muſket?

F. I will contribute no more to the club, and purchaſe a firelock with my ſavings.

G. It is not neceſſary——I have two, and will make you a preſent of one with complete accoutrements.

F. I accept it thankfully, and will converſe with you at your leiſure on other ſubjects of this kind.

G. In the mean while, ſpend an hour every morning in the next fortnight in learning to prime and load expeditiouſly, and to fire and charge with bayonet firmly and regularly. I ſay every *morning*; becauſe, if you exerciſe *too late in the evening*, you may fall into ſome of the legal ſnares, which have been ſpread for you by thoſe gentlemen, who would rather ſecure game for their table, than liberty for the nation.

F. Some of my neighbours, who have ſerved in the militia, will readily teach me; and, per-

haps, the whole village may be perſuaded to procure arms, and learn their exerciſe.

G. It cannot be expected, that the villagers ſhould purchaſe arms, but they might eaſily be ſupplied, if the gentry of the nation would ſpare a little from their vices and luxury.

F. May they turn to ſome ſenſe of honour and virtue!

G. Farewell, at preſent; and remember, "that a free ſtate is only a more numerous and "more powerful club, and that he only is a free "man, who is member of ſuch a ſtate."

F. Good morning, Sir! You have made me wiſer and better than I was yeſterday; and yet, methinks, I had ſome knowledge in my own mind of this great ſubject, and have been a politician all my life without perceiving it.

THE CHARACTER

OF

JOHN LORD ASHBURTON.

THE publick are here preſented not with a fine picture, but a faithful portrait, with the character of a memorable and illuſtrious man, not in the ſtyle of panegyrick on a monument, but in the language of ſober truth, which friendſhip itſelf could not induce the writer to violate.

JOHN DUNNING (a name to which no title could add luſtre) poſſeſſed profeſſional talents which may truly be called inimitable; for, beſides their ſuperlative excellence, they were peculiarly his own; and as it would ſcarcely be poſſible to copy them, ſo it is hardly probable that nature or education will give them to another. His language was always pure, always elegant; and the beſt words dropped eaſily from his lips into the beſt places with a fluency at all times aſtoniſhing, and, when he had perfect health, really melodious: his ſtyle of ſpeaking conſiſted of all the turns, oppoſitions, and figures, which

the old Rhetoricians taught, and which *Cicero* frequently practiſed, but which the auſtere and ſolemn ſpirit of *Demoſthenes* refuſed to adopt from his firſt maſter, and ſeldom admitted into his orations, political or forenſick.

Many at the bar and on the bench thought this a vitiated ſtyle; but, though diſſatisfied as criticks, yet, to the confuſion of all criticiſm, they were tranſported as hearers. That faculty, however, in which no mortal ever ſurpaſſed him, and which all found irreſiſtible, was his wit. This relieved the weary, calmed the reſentful, and animated the drowſy: this drew ſmiles even from ſuch as were the objects of it; ſcattered flowers over a deſert; and, like ſun-beams ſparkling on a lake, gave ſpirit and vivacity to the dulleſt and leaſt intereſting cauſe. Not that his accompliſhments, as an advocate, conſiſted principally in volubility of ſpeech or livelineſs of raillery. He was endued with an intellect, ſedate, yet penetrating; clear, yet profound; ſubtle, yet ſtrong. His knowledge too was equal to his imagination, and his memory to his knowledge. He was no leſs deeply learned in the ſublime principles of juriſprudence and the particular laws of his country, than accurately ſkilled in the minute, but uſeful, practice of all our different courts. In the nice conduct of a complicated

cauſe, no particle of evidence could eſcape his vigilant attention, no ſhade of argument could elude his comprehenſive reaſon. Perhaps the vivacity of his imagination ſometimes prompted him to ſport where it would have been wiſer to argue; and, perhaps, the exactneſs of his memory ſometimes induced him to anſwer ſuch remarks as hardly deſerved notice, and to enlarge on ſmall circumſtances which added little to the weight of his argument: but thoſe only who have experienced can, in any degree, conceive the difficulty of exerting all the mental faculties in one inſtant, when the leaſt deliberation might loſe the tide of action irrecoverably. The people ſeldom err in appreciating the character of ſpeakers; and thoſe clients who were too late to engage DUNNING on their ſide, never thought themſelves ſecure of ſucceſs, while thoſe againſt whom he was engaged were always apprehenſive of a defeat.

As a lawyer, he knew that Britain could only be happily governed on the principles of her conſtitution, or publick law; that the regal power was limited, and popular rights aſcertained by it; but that the ariſtocracy had no other power than that which too naturally reſults from property, and which laws ought rather to weaken than fortify: he was, therefore, an equal ſupporter of

juſt prerogative, and of national freedom, weighing both in the noble balance of our recorded conſtitution. An able and aſpiring ſtateſman, who profeſſed the ſame principles, had the wiſdom to ſolicit, and the merit to obtain, the friendſhip of this great man; and a connection, planted originally on the firm ground of ſimilarity in political ſentiments, ripened into perſonal affection which nothing but death could have diſſolved or impaired. Whether in his miniſterial ſtation he might not ſuffer a few prejudices inſenſibly to creep on his mind, as the beſt men have ſuffered becauſe they were men, may admit of a doubt; but, if even prejudiced, he was never uncandid, and though pertinacious in all his opinions, he had great indulgence for ſuch as differed from him.

His ſenſe of honour was lofty and heroick; his integrity ſtern and inflexible; and though he had a ſtrong inclination to ſplendour of life, with a taſte for all the elegancies of ſociety, yet no love of dignity, of wealth, or of pleaſure, could have tempted him to deviate, in a ſingle inſtance, from the ſtraight line of truth and honeſty. He carried his democratical principles even into ſocial life, where he claimed no more of the converſation than his juſt ſhare, and was always candidly attentive, when it was his turn to be a hearer. His enmities were ſtrong, yet placable;

but his friendſhips were eternal; and if his affections ever ſubdued his judgment, it muſt have been in caſes, where the fame or intereſt of a friend were nearly concerned. The veneration with which he conſtantly treated his father, whom his fortunes and reputation had made the happieſt of mortals, could be equalled only by the amiable tenderneſs which he ſhewed as a parent. He uſed to ſpeak with wonder and abhorrence of Swift, who was not aſhamed to leave a written declaration, "that he could never be fond of children;" and with applauſe of the caliph, who, on the eve of a deciſive battle, which was won by his valour and wiſdom, amuſed himſelf in his tent with ſeeing his children ride on his ſcymitar, and play with his turban, and diſmiſſed a general, as unlikely to treat the army with lenity, who durſt reprove him for ſo natural and innocent a recreation.

For ſome months before his death, the nurſery had been his chief delight, and gave him more pleaſure than the cabinet could have afforded: but this parental affection, which had been a ſource of ſo much felicity, was probably a cauſe of his fatal illneſs. He had loſt one ſon, and expected to loſe the other, when the author of this painful tribute to his memory parted from him with tears in his eyes, little hoping to ſee him again in a periſhable ſtate.—As he perceives,

without affectation, that his tears now ſteal from him, and begin to moiſten the paper on which he writes, he reluctantly leaves a ſubject, which he could not ſoon have exhauſted; and when he alſo ſhall reſign his life to the great Giver of it, he deſires no other decoration of this humble grave-ſtone than this honourable truth:

> With none to flatter, none to recommend,
> DUNNING approv'd and mark'd him as a friend.

END OF THE SIXTH VOLUME.

T. DAVISON, Printer, Whitefriars.